PEKAN NENAS INDUSTRIES SDN BHD

v.

CHANG CHING CHUEN & ORS

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
LAMIN MOHD YUNUS PCA
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-3-95]
11 NOVEMBER 1997

LAND LAW: *Sale of land - Indefeasibility of title and interests - Allegation of fraud- Whether transaction tainted with fraud - Meaning of fraud - Whether there must be actual fraud or dishonesty - Mere knowledge of existence of an unregistered claim in land - Whether could amount to fraud - Purchaser completed sale after obtaining legal advice - Whether could be said to have acted dishonestly - National Land Code 1965, s. 340(2)(a)*

LAND LAW: *Sale of Land - Bona fide purchaser - Sale and purchase agreement - Non-payment of full purchase price upon execution of agreement - Effect - Whether purchaser a bona fide purchaser for value - Specific Relief Act 1950, s. 26(b) - Applicability*

LAND LAW: *Sale of land - Bona fide purchaser - Outsider dealing with company - Sale transacted with directors of company - Irregularities in resolution authorising sale of land - Circumstances raising doubts on possible abuse of power - Duty of outsider/purchaser - Whether dutybound to ascertain that transaction was regular - Whether only to investigate and neutralise circumstances of suspicion - Irregularities unknown to purchaser - Whether entitled to rely on the principle in Royal British Bank Ltd v. Turquand*

COMPANY LAW: *Resolutions - Sale of land - Resolution authorising sale of land to outsider - Irregularities in resolution - Irregularities unknown to outsider - Whether sale transaction invalid - Whether irregularities internal matters of company - Whether outsider affected by irregularities - Consideration of Royal British Bank Ltd v. Turquand - Power of court to validate improperly-called meetings - Companies Act 1965, s. 355*

The first and the sixth respondents ('the Father and the Mother') had incorporated a company known as Aik Ming (Malaysia) Sdn Bhd ('the Family Company'). The Family Company was engaged in the business of purchasing and acquiring lands and in 1973 it acquired six pieces of land from the Father ('the disputed properties'). Misunderstandings subsequently arose among the shareholders and directors of the Family Company, which later developed into a quarrel between the Father on the one side and the Mother and the seventh respondent ('the Eldest Son') on the other. On 17 April 1990, in an attempt to take over control of the Family Company, the Mother and the Eldest Son, without the Father's knowledge, convened a board meeting of the Family Company and by resolutions thereat, removed some of the directors of the company. Further board meetings were convened by the Mother on 10 May 1990 and 26 May 1990, also without the Father's knowledge, whereby resolutions were made to sell off the disputed properties.

On 6 September 1990 the Father entered a private caveat against the disputed properties ('the First Caveat') on the ground that he had lost the title deeds thereof. This was followed by another caveat filed on 29 December 1990 ('the Second Caveat'). The Mother and the Eldest Son, in the meanwhile, had started negotiations with one Dato Tan, the alter ego of the appellant ('the Intervener Purchaser'), and on 3 December 1990 executed a sale and purchase agreement whereby they sold the disputed properties to the latter for RM4.8 million. A deposit of RM668,000 was paid by Dato Tan upon executing this agreement, while the balance price of RM4.132 million was paid in February 1991.

It was not in dispute that Dato Tan was aware of the First Caveat when signing the sale and purchase agreement, but decided to proceed with it upon the advice of his solicitor that there was no problem in removing the caveat. This apart, he had also relied on the Mother's assurance that she had custody of the title deeds, as well as on several documents of the Family Company including *inter alia* the resolution authorising sale of the disputed properties. Dato Tan, likewise, also knew about the Second Caveat when he paid the RM4.132 million balance price, but was prompted to make that payment upon the advice of his solicitor that such payment was necessary to avert forfeiture of the RM668,000 deposit.

Following the Father's application to declare invalid the sale of the disputed properties, the High Court ruled that the Family Company's board meeting of 17 April 1990 was null and void for non-notice and non-receipt of the agenda, and on that ground set aside the sale of the disputed properties. Apparently, the learned judge had declined to sanction the said meeting under s. 355 of the Companies Act 1965, on the ground that the court's power to

validate an improperly called meeting could not be exercised where there was injustice to members who did not attend. The Intervener/Purchaser appealed to the Court of Appeal, and contended therein that it was at all material times a *bona fide* purchaser for value of the disputed properties. In essence, the Intervener/Purchaser's argument was that, if at all there had been an irregularly convened board meeting, the irregularities that had taken place were matters for the internal management of the company which it, as an outsider, had no means of discovering, with the result that it was entitled to rely on the principle enunciated in *Royal British Bank Ltd v. Turquand* ('the Turquand Rule'). It was further argued that mere knowledge of an unregistered claim or interest did not amount to fraud within the meaning of s. 340(2)(a) of the National Land Code 1965 ('NLC'), and that being so, its title to the disputed properties must remain indefeasible in law.

The Court of Appeal, while admitting that Dato Tan was an outsider dealing with a company, held nevertheless; (i) that on the facts Dato Tan ought to have been put on inquiry as to the authority of the Mother and the Eldest Son to sell the properties; (ii) that by such inquiry Dato Tan was dutybound to ascertain the capacity of the Mother and the Eldest Son to deal with him; (iii) that his failure to so inquire had deprived the Intervener/Purchaser of the protection of the Turquand Rule; (iv) that upon the affidavit that he had filed to set aside an injunction restraining dealings in the disputed properties, it was a fact that Dato Tan had only received the resolutions authorising the sale on 8 March 1991, and so, could not have relied on the resolutions when signing the agreement of 3 December 1990; and (v) that the Intervener/Purchaser, having only paid a deposit upon executing the sale and purchase agreement, was not a *bona fide* purchaser by virtue of s. 26(b) of the Specific Relief Act 1950. In the event, although the Court of Appeal had absolved the Intervener/Purchaser of the charge of fraud and conspiracy, it nonetheless affirmed the decision of the High Court.

The Intervener/Purchaser appealed further, and before the learned judges herein, the following key issues arose for determination, namely: (i) whether in the circumstances the Intervener/Purchaser was entitled to rely on the Turquand Rule; (ii) whether the Intervener/Purchaser, in any case, was a *bona fide* purchaser for value of the disputed properties; (iii) whether Dato Tan, in transacting the purchase of the disputed properties, was guilty of fraud within the meaning of s. 340(2)(a) NLC such as to defeat the Intervener/Purchaser's title thereto; and (iv) whether it was proper of the Court of Appeal to have invoked s. 26(b) of the Specific Relief Act 1950 and ruled that the Intervener Purchaser, by reason thereof, was not a *bona fide* purchaser of the disputed properties.

Held:

Per Edgar Joseph Jr FCJ:

[1] The effect of the Turquand Rule is that it reduces the enquiries which outsiders having dealings with a company must take. Such outsiders have no right to insist on proof by the company's directors that the provisions of its Memorandum & Articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering.

[1a] An outsider, however, cannot invoke the benefit of the Turquand Rule if he is put upon inquiry. He cannot therefore presume that things are rightly done if inquiry that he ought to have made would tell him that they were wrongly done. Whether in any given case, the person dealing with a company is put to inquiry, must depend upon all the particular circumstances.

[2] An outsider is thus entitled to enforce the contract provided that he acts in good faith and without notice that the authority is being abused. In the circumstances, at the time of the execution of the sale and purchase agreement dated 3 December 1990, unless there was proof that the Intervener/Purchaser knew or ought to have known of the irregularities with regard to the meeting of 17 April 1990, it is difficult to see how the contention advanced by the Intervener/Purchaser that it is entitled to rely on the Turquand Rule could have been rebutted.

[3] The contents of the statutory declaration as filed by the Father in support of the First Caveat were insufficient to put the Intervener/ Purchaser on inquiry as to deprive it of the protection afforded by the Turquand Rule. The said statutory declaration was rather economical with the truth and said nothing about the break up of the family or that the Mother's faction was not authorised to sell the disputed properties.

[3a] The First Caveat, at best, only raised a doubt regarding a possible ***abuse of power***. That being so, the duty cast upon the Intervener/Purchaser was **not** to ascertain whether the transaction was in fact regular but merely to neutralise the circumstances of suspicion. In short, its duty is only to **investigate** as to whether the Mother and Eldest Son had authority to act on behalf of the Family Company. The Court of Appeal had therefore put too high a duty on the Intervener/Purchaser when it implied that it was its duty not merely to inquire but to ascertain that the transaction was regular.

[4] It was evident that, upon knowing about the First Caveat, Dato Tan had sought the advice of his Solicitor and had also made enquiries with the Mother, the Secretary of the company, who assured him that she had custody of the title deeds. He had also relied on the documents of the Family Company such as the resolution of 26 May 1990 authorising the sale of the disputed properties, its Form 49 and its Memorandum and Articles which he was entitled to do. In such circumstances, it was reasonable of Dato Tan to have thought that he was dealing with the Family Company or with authorised persons of the Family Company, and this was sufficient to negative or neutralise the circumstances of suspicion aroused by the First Caveat. In any case, the resolution relied upon by Dato Tan was a representation by the Family Company upon which an estoppel may be based even if the Mother and the Eldest Son were not actually authorised persons.

[5] Dato Tan had also followed the advice of his solicitor when he paid the balance of the purchase price. There was nothing improbable in Dato Tan's explanation that he advisedly paid the balance price in order to avert the forfeiture of the deposit under the sale and purchase agreement. The Court of Appeal had clearly misread the evidence when it rejected this submission of the Intervener/Purchaser.

[6] It was wrong of the High Court below to have relied on the proposition that the court's power to validate improperly-called meetings under s. 355 of the Companies Act 1965 could not be exercised where there was injustice to members who did not attend. Such consideration is irrelevant where, as here, outsiders who believe they have entered into transaction with the company, are not aware if a board meeting is irregular.

[7] It was wrong of the Court of Appeal to have relied on the contents of Dato Tan's affidavit as substantive evidence, in particular as an admission, when that affidavit had not been put to Dato Tan in cross-examination. Therefore, it was a misdirection for the Court of Appeal to have concluded, upon reliance on that affidavit, that the Intervener/Purchaser had acted imprudently by not calling for the resolutions earlier.

[7a] The Court of Appeal had also not been fair in criticising Dato Tan *inter alia* for paying RM100,000 for the option to purchase, for being unduly hasty in acquiring vacant possession, for paying a hefty deposit of RM668,000 and for paying the balance purchase price in cash in Singapore. It is to be noted that although Dato Tan, in paying the balance price in the way he did, might not be acting prudently, or might be acting in such a way as to expose him to liability under the taxing statute, these are not matters relevant for the purpose of determining

whether, as an outsider, he was entitled to invoke the Turquand Rule or the question of whether his company was a *bona fide* purchaser.

[8] The word 'fraud' in s. 340(2)(a) NLC means actual fraud or dishonesty of some sort, and not constructive or equitable fraud. Hence, mere knowledge of the existence of an unregistered claim or interest in land does not amount to fraud unless it is demonstrated that there has been a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest therein.

[8a] The evidence of a solicitor's advice given to a purchaser that the purchaser could proceed with a transaction and that without such advice the purchaser would not have thus proceeded, is material in determining whether an allegation of fraud has been substantiated. In this case, since Dato Tan, for the Intervener/Purchaser, had completed the transaction by payment of the balance price only after obtaining legal advice that he could do so, it could not be said that he had acted dishonestly.

[9] Where there is a dispute between the immediate parties to a sale and purchase transaction, a *bona fide* purchaser is not necessarily one who has paid the full purchase price. The observation of the Court of Appeal in respect of s. 26(b) of the Specific Relief Act 1950, and of its applicability to the present case, cannot therefore be approved. It is also clear that, if, in case such as the present, recourse were had to cases under the Indian equivalent of our Specific Relief Act in considering the question who is a *bona fide* purchaser for value, the Turquand Rule could be deprived of much of its vitality.

[9a] When as here, the question arises whether a person dealing with a company has contracted in good faith, there is no qualification on the definition of purchaser and all that is necessary is that he should have contracted in good faith and have given value. For this purpose, the common law definition of a *bona fide* purchaser is applicable, and consequently, the question to consider is: 'was the Intervener/Purchaser behaving honestly when it purchased the disputed properties'

[10] The Intervener/Purchaser had succeeded in establishing that it was, at all material times, a *bona fide* purchaser for value and is therefore entitled to have the transfers of the disputed properties registered in its name.

[Appeal allowed.]

UNDANG-UNDANG TANAH: *Penjualan tanah - Hakmilik tak boleh sangkal - Pengataan fraud - Samada transaksi dikotori oleh fraud - Makna fraud - Samada harus wujud fraud sebenar atau ketidakjujuran - Pengetahuan semata-mata tentang kewujudan tuntutan tak berdaftar di dalam tanah - Samada boleh menjadi fraud - Pembeli menyempurnakan pembelian selepas mendapat nasihat guaman - Samada boleh dikatakan bertindak secara tidak jujur - Kanun Tanah Negara 1965, s. 340(2)(a)*

UNDANG-UNDANG TANAH: *Penjualan tanah - Pembeli bona fide - Perjanjian jual beli - Harga penuh pembelian tidak dilangsai sewaktu perjanjian dimeterai - Kesan - Samada pembeli seorang pembeli bona fide dengan nilai - Seksyen 26(b) Akta Relif Spesifik 1950 - Pemakaian*

UNDANG-UNDANG TANAH: *Penjualan tanah - Pembeli bona fide - Orang luar berurusan dengan syarikat - Penjualan diuruskan dengan pengarah syarikat - Ketidak-teraturan dalam resolusi mengizinkan penjualan tanah - Halkeadaan membangkitkan kesangsian tentang kemungkinan berlakunya penyalahgunaan kuasa - Tanggungjawab orangluar/pembeli - Samada bertanggungjawab untuk menentukan bahawa transaksi adalah teratur - Samada hanya perlu menyiasat dan melunturkan suasana sangsi - Ketidak-teraturan tidak diketahui oleh pembeli - Samada berhak untuk bergantung kepada prinsip dalam kes Royal British Bank Ltd v. Turquand*

UNDANG-UNDANG SYARIKAT: *Resolusi - Penjualan tanah - Resolusi mengizinkan penjualan tanah kepada orang luar - Ketidak-teraturan pada resolusi - Ketidak-teraturan tidak diketahui oleh orang luar - Samada transaksi penjualan sah - Samada ketidak-teraturan perkara dalaman syarikat - Samada ketidak-teraturan tidak memberi kesan kepada orang luar - Pertimbangan Royal British Bank Ltd v. Turquand - Kuasa mahkamah untuk mengesahkan mesyuarat yang dipanggil secara luar aturan - Seksyen 355 Akta Syarikat 1965*

Responden pertama dan ke enam ('Bapa dan Ibu') telah memperbadankan sebuah syarikat yang dipanggil Aik Ming (Malaysia) Sdn Bhd ('Syarikat Keluarga'). Syarikat Keluarga berkecimpung dalam perniagaan pembelian dan pengambil-alihan tanah dan pada tahun 1973 ia telah memperoleh enam bidang tanah daripada Bapa ('hartanah yang dipertikaikan'). Perselisihan faham kemudiannya timbul di kalangan pemegang saham dan pengarah Syarikat Keluarga, yang berkembang dan menjadi satu perbalahan di antara Bapa di satu pihak dan Ibu serta responden ke tujuh ('Anak Sulung') di pihak yang lain

Pada 17 April 1990, dalam percubaan mereka untuk mengambil alih kuasa dalam Syarikat Keluarga, Ibu dan Anak Sulung, tanpa pengetahuan Bapa, telah mengadakan mesyuarat Syarikat Keluarga dan melalui resolusi yang dibuat di situ, menyingkir beberapa pengarah syarikat. Mesyuarat pengarah juga telah diadakan oleh Ibu pada 10 Mei 1990 dan 26 Mei 1990, juga tanpa pengetahuan Bapa, di mana resolusi telah dibuat untuk menjual hartanah yang dipertikaikan.

Pada 6 September 1990 Bapa telah memasukkan kaveat persendirian terhadap hartanah yang dipertikaikan ('Kaveat Pertama') atas alasan bahawa beliau telah kehilangan surat hakmilik hartanah tersebut. Ini diikuti oleh satu lagi kaveat yang dimasukkan pada 29 Disember 1990 ('Kaveat Kedua'). Ibu dan Anak Sulung, sementara itu, telah mengadakan perundingan dengan seorang Dato Tan, iaitu alter ego perayu ('Pencelah/Pembeli'), dan pada 3 Disember 1990 memeterai satu perjanjian jual beli di mana mereka menjual hartanah yang dipertikaikan kepada pihak terkemudian dengan harga RM4.8 juta. Wang pendahuluan sebanyak RM668,000 telah dibayar oleh Dato Tan sewaktu memeterai perjanjian, sementara baki harga sebanyak RM4.132 juta dibayar pada Februari 1991.

Tidak dipertikaikan bahawa Dato Tan menyedari tentang Kaveat Pertama ketika menandatangani perjanjian jual beli, tetapi memutus untuk meneruskan dengan pemeteraian tersebut atas nasihat peguamcaranya bahawa tidak ada masaalah dalam memecat kaveat tersebut. Selain itu, beliau juga bergantung kepada jaminan Ibu bahawa warkah hakmilik berada dalam simpanannya, serta kepada beberapa dokumen Syarikat Keluarga termasuk, antara lain, resolusi yang mengizinkan penjualan hartanah yang dipertikaikan. Dato Tan juga sedar tentang Kaveat Kedua apabila beliau membayar baki harga sebanyak RM4.132 juta, tetapi terdorong untuk membuat pembayaran itu atas nasihat peguamcaranya bahawa pembayaran tersebut adalah perlu bagi mengelakkan wang pendahuluan sebanyak RM668,000 itu terlupus.

Ekoran permohonan Bapa untuk mengisytiharkan penjualan hartanah yang dipertikaikan itu sebagai tak sah, Mahkamah Tinggi memutuskan bahawa mesyuarat lembaga pengarah Syarikat Keluarga pada 17 April 1990 adalah tak sah kerana ketiadaan notis dan ketidak-terimaan agenda, dan atas alasan itu membatalkan penjualan hartanah yang dipertikaikan. Kelihatannya, Hakim yang arif enggan mengesahkan mesyuarat tersebut di bawah s. 355 Akta Syarikat, atas alasan bahawa kuasa mahkamah untuk mengesahkan mesyuarat yang dipanggil secara luar aturan tidak boleh dilaksanakan jika ketidakadilan berlaku terhadap ahli-ahli yang tidak hadir. Pencelah/Pembeli merayu kepada Mahkamah Rayuan, dan berhujah di dalamnya bahawa ia adalah pada setiap masa merupakan pembeli *bona fide* dengan nilai hartanah yang dipertikaikan

itu. Secara intinya, hujah Pencelah/Pembeli adalah bahawa, jikapun betul wujud mesyuarat yang dipanggil secara luar aturan, ketidak-teraturan yang berlaku itu adalah merupakan halperkara dalaman syarikat, di mana ia, sebagai orang luar, tiada cara untuk mengetahuinya, yang berakibat bahawa ia berhak untuk bergantung kepada prinsip yang diputuskan dalam kes *Royal British Bank Ltd v. Turquand ('Kaedah Turquand')*. Dihujahkan selanjutnya bahawa pengetahuan semata-mata akan kewujudan suatu tuntutan atau kepentingan tidak berdaftar bukanlah fraud seperti yang dimaksudkan oleh s. 340(2)(a) Kanun Tanah Negara 1965, dan oleh kerana itu, hakmiliknya terhadap hartanah yang dipertikaikan mestilah kekal tak boleh disangkal.

Mahkamah Rayuan, walaupun mengakui bahawa Dato Tan adalah seorang orang luar yang berurusan dengan sebuah syarikat, memutuskan (i) bahawa di atas fakta Dato Tan seharusnya menyiasat kuasa Ibu dan Anak Sulung untuk menjual hartanah berkenaan (ii) bahawa melalui siasatan tersebut, Dato Tan adalah bertanggungjawab untuk menentukan kapasiti Ibu dan Anak Sulung untuk berurusan dengannya (iii) bahawa kegagalannya untuk menyiasat telah menyebabkan Pencelah/Pembeli tidak dilindungi oleh Kaedah Turquand (iv) bahawa berdasarkan afidavit yang difailkan olehnya untuk membatalkan satu injunksi yang menghalang urusan dalam harta yang dipertikaikan, ianya adalah satu fakta bahawa Dato Tan hanya menerima resolusi yang mengizinkan penjualan itu pada 8 Mac 1991, dan oleh sebab itu, beliau tidak mungkin bergantung kepada resolusi tersebut sewaktu menandatangani perjanjian bertarikh 3 Disember 1990 (v) bahawa Pencelah/Pembeli, dengan hanya membayar wang pendahuluan ketika memeterai perjanjian jual beli, bukanlah merupakan seorang pembeli *bona fide* berdasarkan peruntukan s. 26(b) Akta Relif Spesifik 1950. Maka itu, walaupun Mahkamah Rayuan telah melepaskan Pencelah/Pembeli dari dakwaan fraud dan komplot, ia bagaimanapun mempersetujui dan mengesahkan keputusan Mahkamah Tinggi.

Pencelah/Pembeli merayu lagi, dan di hadapan yang-arif-yang arif hakim di sini, isu-isu penting berikut timbul untuk keputusan, iaitu: (i) samada dalam halkeadaan yang wujud Pencelah/Pembeli berhak untuk bergantung kepada Kaedah Turquand; (ii) samada Pencelah/Pembeli, walau apa pun, adalah pembeli *bona fide* dengan nilai hartanah yang dipertikaikan; (iii) samada Dato Tan, dalam menguruskan pembelian hartanah yang dipertikaikan, telah melakukan fraud dalam maksud s. 340(2)(a) KTN dan dengan itu telah memudaratkan hakmilik Pencelah/Pembeli kepada harta tersebut; dan (iv) samada Mahkamah Rayuan bertindak dengan betul apabila menggunapakai s. 26(b) Akta Relif Spesifik 1950 dan memutuskan bahawa Pencelah/Pembeli, ekoran dari itu, bukanlah seorang pembeli *bona fide* hartanah yang dipertikaikan.

Diputuskan:
Oleh Edgar Joseph Jr HMP:

[1] Kesan Kaedah Turquand adalah bahawa ia telah mengurangkan pertanyaan yang perlu dibuat oleh orang luar apabila berurusan dengan sebuah syarikat. Orang-orang luar sedemikian tiada hak untuk meminta supaya pengarah-pengarah syarikat membuktikan bahawa peruntukan-peruntukan Memorandum dan Artikel syarikat telah dipatuhi, dan dengan itu mereka sendiri pun tidaklah boleh dianggap sebagai mempunyai pengetahuan konstruktif berhubung apa-apa kegagalan untuk mematuhi, yang mana mereka tidak mempunyai cara untuk mengetahuinya.

[1a] Seorang orang luar, bagaimanapun, tidak boleh menggunapakai manafaat Kaedah Turquand jika dia diletakkan dalam keadaan untuk menyiasat. Beliau dengan itu tidak boleh beranggapan bahawa sesuatu perkara itu telah dibuat dengan betul sekiranya siasatan yang beliau sepatutnya buat akan memberitahunya bahawa perkara tersebut telah dibuat dengan salah. Samada dalam sesuatu kes itu, orang yang berurusan dengan syarikat itu perlu menyiasat, bergantung kepada halkeadaan kes tersebut.

[2] Seorang orang luar dengan itu berhak untuk melaksanakan sesuatu kontrak dengan syarat beliau bertindak dengan jujur dan tanpa notis bahawa kuasa telah disalahgunakan. Dengan yang demikian, pada ketika pemeteraian perjanjian jual beli bertarikh 3 Disember 1990 tersebut, kecuali wujud bukti bahawa Pencelah/Pembeli tahu atau sepatutnya tahu tentang ketidak-teraturan berhubung mesyuarat pada 17 April 1990, agak sukar untuk melihat bagaimana hujah seperti yang dikemukakan oleh Pencelah/Pembeli, yakni bahawa ia berhak untuk bergantung kepada Kaedah Turquand, dapat dipatahkan.

[3] Kandungan akuan berkanun seperti yang difailkan oleh Bapa bagi menyokong Kaveat Pertama adalah tidak mencukupi untuk meletakkan Pencelah/Pembeli kepada satu penyiasatan sehingga menyebabkan ia tidak lagi dapat bergantung kepada Kaedah Turquand. Akuan berkanun tersebut agak kurang benar dan tidak berkata apa-apa tentang keretakan dalam keluarga atau pun bahawa pihak Ibu tidak diberi izin untuk menjual harta yang dipertikaikan.

[3a] Kaveat Pertama, pada tahap yang maksima, hanya membangkitkan satu keraguan tentang kemungkinan berlakunya salah guna kuasa. Oleh kerana itulah keadaannya, tanggungjawab Pencelah/Pembeli bukanlah untuk mempastikan bahawa transaksi tersebut sesungguhnya teratur tetapi hanyalah untuk melunturkan keadaan kesangsian yang wujud itu.

Ringkasnya, tanggungjawab mereka hanyalah untuk menyiasat samada Ibu dan Anak Sulung mempunyai izin untuk bertindak bagi pihak Syarikat Keluarga. Mahkamah Rayuan dengan itu telah meletakkan satu tanggungjawab yang terlalu tinggi ke atas Pencelah/Pembeli apabila membuat andaian bahawa tanggungjawab mereka bukan setakat menyiasat tetapi harus mempastikan bahawa transaksi adalah teratur.

[4] Adalah jelas bahawa, sewaktu mengetahui tentang Kaveat Pertama, Dato Tan telah meminta nasihat peguamcaranya dan juga membuat pertanyaan kepada Ibu, yang merupakan Setiausaha syarikat, yang menyakinkannya bahawa beliau mempunyai hakmilik hartanah tersebut. Dato Tan juga bergantung kepada dokumen Syarikat Keluarga seperti resolusi bertarikh 26 Mei 1990 yang mengizinkan penjualan hartanah yang dipertikaikan, Borang 49 syarikat serta Memorandum dan Artikelnya, yang mana beliau berhak untuk berbuat demikian. Dalam halkeadaan sedemikian, adalah munasabah bagi Dato Tan untuk berpendapat bahawa beliau sedang berurusan dengan Syarikat Keluarga ataupun dengan orang-orang yang direstui oleh Syarikat Keluarga, dan ini sudah mencukupi untuk menolak atau melunturkan suasana sangsi yang diwujudkan oleh Kaveat Pertama. Walau apa pun, resolusi yang Dato Tan bergantung kepadanya itu adalah satu representasi oleh Syarikat Keluarga di atas mana estoppel boleh beroperasi walaupun Ibu dan Anak Sulung sebenarnya bukan orang yang direstui.

[5] Dato Tan juga mengikut nasihat peguamcaranya apabila beliau membayar baki harga pembelian. Penerangan Dato Tan bahawa beliau membayar baki harga atas nasihat dengan tujuan untuk mengelakkan wang pendahuluan daripada dirampas bukanlah sesuatu yang mustahil. Mahkamah Rayuan jelas telah tersalah baca keterangan apabila menolak hujah Pencelah/Pembeli ini.

[6] Ianya silap bagi Mahkamah Tinggi di bawah untuk bergantung kepada proposisi bahawa kuasa mahkamah untuk mengesahkan mesyuarat yang dipanggil secara tidak teratur di bawah s. 355 Akta Syarikat 1965 tidak boleh dilaksanakan jika terdapat ketidakadilan terhadap ahli-ahli yang tidak hadir. Pertimbangan sedemikian adalah tidak relevan di mana, sepertimana halnya di sini, orang luar yang mempercayai bahawa mereka berurusan dengan syarikat tidak menyedari bahawa mesyuarat lembaga pengarah telah tidak dijalankan secara teratur.

[7] Ianya silap bagi Mahkamah Rayuan untuk melihat kandungan afidavit Dato Tan sebagai keterangan substantif, lebih-lebih lagi sebagai satu pengakuan, bilamana afidavit berkenaan tidak dikemukakan kepada Dato Tan sewaktu pemeriksaan balas. Mahkamah Rayuan dengan itu telah tersalah arah apabila ia memutuskan, berdasarkan kepada afidavit tersebut, bahawa Pencelah/Pembeli telah bertindak secara tidak wajar apabila gagal meminta resolusi dengan lebih awal.

[7a] Mahkamah Rayuan juga tidak bertindak adil apabila mengkritik Dato Tan antaranya kerana membayar RM100,000 untuk mendapatkan opsyen untuk membeli, kerana bertindak terburu-buru untuk mendapatkan milikan kosong, kerana membayar pendahuluan yang tinggi sebanyak RM668,000 dan kerana membayar baki harga secara tunai di Singapura. Harus diingat bahawa, walaupun Dato Tan, dengan membayar baki harga secara yang dibuatnya, tidak bertindak wajar, atau bertindak dengan cara yang membolehkannya menanggung liabiliti di bawah statut cukai, persoalan ini bukanlah persoalan yang relevan dalam menentukan samada, sebagai seorang orang luar, beliau berhak untuk menggunapakai Kaedah Turquand ataupun samada syarikatnya merupakan pembeli *bona fide.*

[8] Perkataan 'fraud' di dalam s. 340(2)(a) KTN bermakna fraud sebenar atau suatu ketidakjujuran, dan bukan fraud konstruktif atau fraud ekuiti. Oleh itu, pengetahuan semata-mata akan kewujudan suatu tuntutan atau kepentingan tidak berdaftar di dalam tanah tidak akan menjadi fraud kecuali ianya dibuktikan bahawa terdapat percubaan yang sengaja dan tidak jujur untuk melucutkan penuntut tidak berdaftar dari hak dan kepentingannya dalam tanah tersebut.

[8a] Keterangan tentang nasihat yang diberi oleh seorang peguamcara kepada seorang pembeli bahawa pembeli tersebut boleh meneruskan dengan sesuatu transaksi dan bahawa pembeli tidak akan meneruskan dengan transaksi berkenaan tanpa nasihat yang sedemikian, adalah material dalam menentukan samada satu tuduhan fraud telah dibuktikan. Dalam kes ini, oleh kerana Dato Tan, bagi pihak Pencelah/Pembeli, telah menyempurnakan transaksi dan membayar baki harga hanya setelah mendapat nasihat peguam bahawa beliau boleh berbuat demikian, beliau dengan itu tidak boleh dikatakan sebagai telah bertindak secara tidak jujur.

[9] Di mana terdapat pertelingkahan di antara pihak-pihak terdekat kepada satu transaksi jual beli, seorang pembeli *bona fide* bukanlah semestinya seorang yang telah membayar sepenuhnya harga belian. Pemerhatian Mahkamah Rayuan berhubung s. 26(b) Akta Relif Spesifik 1950, dan berhubung pemakaiannya terhadap kes semasa, dengan itu tidak dapat dibenarkan. Ianya juga jelas bahawa, sekiranya, dalam kes seperti kes semasa, rujukan dibuat kepada kes-kes India di bawah Akta Relif Spesifik di sana yang bersamaan dalam menjawab soalan siapakah seorang pembeli *bona fide* dengan nilai, Kaedah Turquand akan hilang banyak daya tenaganya.

[9a] Di mana persoalan berbangkit samada seseorang yang berurusan dengan sebuah syarikat telah berkontrak dengan jujurnya, seperti halnya di sini, tiada apa-apa kualifikasi terhadap takrif pembeli dan apa yang diperlukan hanyalah bahawa beliau telah berkontrak dengan jujur dan telah memberi nilai. Untuk tujuan ini, definasi common law tentang pembeli *bona fide* adalah terpakai, dan dengan itu, soalan yang perlu dipertimbangkan ialah: 'adakah Pencelah/Pembeli berkelakuan jujur apabila ia membeli hartanah yang dipertikaikan'.

[10] Pencelah/Pembeli berjaya membuktikan bahawa ia, pada semua masa material, adalah seorang pembeli *bona fide* dengan nilai dan oleh itu berhak untuk mendaftar pindahmilik hartanah yang dipertikaikan itu kepada namanya.

[Rayuan dibenarkan.]

Cases referred to:

AL Underwood Ltd v. Bank of Liverpool [1924] 1 KB 775 ***(refd)***
Allied Pastoral v. FC of T 44 ALR 607 ***(foll)***
Assets Co v. Mere Roihi [1905] 1 AC 176 ***(refd)***
Benmax v. Austin Motor Co Ltd [1955] AC 370 ***(cit)***
Bhup Narain Singh v. Gokhul Chand Mahton & Ors LR 61 IA 115 ***(refd)***
B Liggett (Liverpool) Ltd v. Barclays Bank Ltd [1928] 1 KB 48 ***(refd)***
Browne v. La Trinidad [1887] 37 Ch D 1 ***(cit)***
Bunt v. Hallinan [1985] 1 NZLR 450 ***(refd)***
Chapleo v. Brunswick Permanent Building Society [1881] 6 QBD 686 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd [1996] 3 CLJ 163 ***(cit)***
Earle's Utilities v. Jacobs 51 TLR 43 ***(refd)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(cit)***
Fels v. Knowles [1906] 26 NZLR 604 ***(foll)***
First Nominee (Pte) Ltd v. New Kok Ann Realthy Sdn Bhd [1983] 2 MLJ 76 ***(dist)***
Garden Gully United Quarry Co v. McLister [1875] 1 App ***(cit)***

Gloucester County Bank v. Rundry Merthyr Steam & House Coal Colliery Co [1895] 1 Ch 629 ***(cit)***
Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203 ***(aff)***
Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325 ***(cit)***
Howard v. Patent Ivory Manufacturing Co [1888] 38 Ch D 156 ***(cit)***
Howbeach Coal Co Ltd v. Teague [1860] 5 H to N 151 ***(cit)***
Hunt v. Fripp [1898] 1 CH D 675 ***(foll)***
Irvine v. Union Bank of Australia [1877] 2 App ***(refd)***
JH Just (Holdings) Pty Ltd v. The Bank of New South Wales [1971] 125 CLR 546 ***(refd)***
Kanssen v. Rialto (West End) Ltd [1944] Ch 346 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam [1989] 1 MLJ 457 ***(cit)***
KL Engineering Bhd Bhd & Anor v. Arab Malaysian Finance Bhd [1994] 2 CLJ 480 FC
Lai Soon Cheong v. Kien Loong Housing Development Sdn Bhd [1993] 2 CLJ 199 ***(refd)***
Linggi Plantations v. Jegathesan [1972] 1 MLJ 89 ***(cit)***
Loke Yew v. Port Swettenham Rubber Co Ltd [1913] AC 491 ***(foll)***
Mahendran Nair & Anor v. Patel [1975] 2 MLJ 207 ***(refd)***
Mahony v. East Holyford Mining Co [1875] LR 7 HL 869 ***(refd)***
Montreal, St Lawrence Light & Power Co v. Robert [1906] AC 196
Morris v. Kanssen [1946] AC 459 ***(refd)***
Ninety - Five Pty Ltd v. Banque Nationale de Paris [1988] WAR 132 ***(foll)***
Northside Development Pty Ltd v. Registrar General Ors [1989-1990] 170 CLR 146 ***(refd)***
Ong Chat Pang & Anor v. Valiappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Osmanoski v. Rose [1974] VR 523 ***(refd)***
Re Bennett [1907] 1 KB 149 ***(cit)***
Re Chennell v. Rothwell 38 LT 33 ***(refd)***
Re Cohen [1924] 2 Ch 515 ***(refd)***
Re Dover Pty Ltd [1981] 6 ACLR 307 ***(foll)***
Rolled Steel Ltd v. British Steel Corp [1986] Ch 246 ***(cit)***
Royal British Bank v. Turquand [1856] 119 ER 474 ***(refd)***
S London Greyhound Racecourses Ltd v. Wake [1931] 1 Ch 496 ***(cit)***
Sinna Ponnu v. Singaru Odayar [1969] 2 Madras LJ 358 ***(not foll)***
Srimati Bibhabati Devi v. Kumar Ramendra Narayyan Roy [1946] AC 508 ***(cit)***
Suruchi Bala & Ors v. Suruchi Bala Deb & Ors AIR [1976] Gau 92
Tajul Ariffin v. Heng Cheng Hong [1993] 2 MLJ 143 ***(cit)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] MLJ 87 ***(cit)***
Tominan Tukimin v. Toh Kai Chup [1989] 2 MLJ 257 ***(cit)***
United Marketing Co v. Hasham Kara [1963] 1 WLR 523 ***(cit)***
Vomisetti Paparao v. Jonnada Venkataramana [1970] 2 An WR 280 ***(not foll)***
Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd [1926] AC 101 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 141(6), 355
Courts of Judicature Act 1964, s. 96
Evidence Act, s. 114(g), (f)
Legal Profession (Practice and Etiquette) Rules 1978, r. 22
National Land Code 1965, s. 340(2)(a), (b)
Real Property Gains Tax Act 1976, s. 21B(1)(a)
Specific Relief Act 1950, s. 26(b)

Other sources referred to:
Company Law, Pennington, 7th edn, pp 54, 143
Law of Evidence, Woodroffe & Amir Ali, 15th edn, p 849

For the plaintiffs - CV Das (Harcharan Singh & K Mohan with him); M/s Harcharan Hashimah & Co
For the 1st-4th defendants - PK Nathan (L Parthiban with him); M/s L Parthiban & Assoc
For the 5th-12th defendants - J Kannaperan; M/s L Parthiban & Assoc

Reported by Rusnah Aziz

JUDGMENT

Edgar Joseph Jr FCJ:

Preliminary

In a sense, this appeal from the judgment of the Court of Appeal is historic, for it is the first to be heard pursuant to the provisions of s. 96 of the Courts of Judicature Act 1964 (as amended by Act A 886/1994 and Act A 909/1995), which explains why we are sitting as a Court comprising five judges of the Federal Court.

The appeal concerns a dispute about ownership of certain lands which has its roots in the breakup of a Singapore family due to the eternal triangle. Unless the context otherwise requires, it will be more convenient, if we refer to the parties, as follows:

The Appellant as "the Intervener/Purchaser".

The First Respondent as "the Father".

The Second Respondent who is the Second Wife of the First Respondent as "the Second Wife Rahimah".

The Third Respondent who is the brother of the First Respondent as "the Father's Brother".

The Fourth Respondent who is the sister of the First Respondent as "the Father's Sister".

The Fifth Respondent an incorporated company of which the First Respondent was founder, Managing Director and Chairman, as "the Family Company".

The Sixth Respondent who is the first wife of the First Respondent as "the Mother".

The Seventh Respondent who is the eldest son of the Father and the Mother as "the Eldest Son Peter".

The Eighth Respondent to the Twelfth Respondent, who are the other children of the First and Sixth Respondents, as "the other children".

The Thirteenth Respondent who is the wife of the Eighth Respondent – the son Paul – as "the Daughter-in-law".

As we have indicated at the outset, the background to the questions which arise for decision in this case is about the breakup of a family due to the proverbial triangle, the breakup being played out on the company front with the opposing factions – one headed by the Father and the other by the Mother, supported by the Children of the Family – battling for control of the Family Company. In the upshot, the Mother and her faction having apparently gained control of the Family Company, then attempted to sell six pieces of land situated in Pontian, Johor, particulars whereof appear hereunder ('the disputed properties') owned by the Family Company to a third party, to wit, an incorporated company known as Pekan Nenas Industries – the Intervener/Purchaser – for RM4.8 million, but the transfers could not be registered because of an interim injunction restraining the same obtained by the Father who sought to impugn, *inter alia,* the validity of the transfers.

The Intervener/Purchaser, had intervened in the contest between the opposing factions, its primary submission being that it was entitled to rely on the Rule in *Royal British Bank v. Turquand* [1856] 119 ER 474, which protects outsiders dealing with a company who do not need to enquire into the regularity of the internal affairs and proceedings of the company and may presume that all is being done regularly. The Intervener/Purchaser's alternative submission was, that if contrary to its primary submission, it was proved that at the material time, it had knowledge of the family dispute, knowledge alone

of an adverse unregistered interest does not make the purchase and the registration impugnable under the Torrens system of land registration. (See, *Waimiha Sawmilling Company Ltd. v. Waione Timber Company Ltd.* [1926] AC 101).

The Judgment Of The High Court

In the High Court at Johor Bahru, the Father and his faction succeeded both against the Mother and her faction as well as against the Intervener/Purchaser when they obtained, *inter alia*, declarations nullifying a meeting of the Family Company's board held on 17 April 1990, in Singapore, and attended only by the Mother and the Eldest Son Peter, both directors, the former being also the Secretary, on the ground of non-notice and non-receipt of the agenda, the effect of which, it was said, was to *nullify all resolutions and decisions made thereat and consequent thereto*, including (i) the purported approval of transfer of shares by the Eldest Son Peter and his brother Paul who is the Eighth Respondent to their sister Amy who is the Ninth Respondent, of all shares registered in the name of the Second Wife Rahimah; (ii) the purported resolution that the Second Wife Rahimah had ceased to be a director by reason of her having ceased to be a shareholder in the Family Company; (iii) the purported resolution appointing the Eighth Respondent Paul and his sister Amy being the Ninth Respondent, and the daughter-in-law Ong Li Mei, being the Thirteenth Respondent, as directors of the Family Company, and, (iv) most importantly, from the Intervener/Purchaser's point of view, setting aside the sale of the disputed properties by the Family Company to the Intervener/Purchaser.

The Judgment Of The Court Of Appeal

The Mother and her faction appealed against the judgment of the High Court and so did the Intervener/Purchaser. Although two separate appeals had been lodged, both appeals came on for hearing on the same day before the Court of Appeal, and by consent of all Counsel concerned, the appeal by the Mother and her faction was heard first, and it having been dismissed without the respondents being called upon, the appeal by the Intervener/Purchaser was then proceeded with, ending in its dismissal as well. The Court of Appeal held that the Judge "was entirely correct in the decision he reached".

The Mother and her faction did not seek leave to appeal to the Federal Court from the Judgment of the Court of Appeal, but the Intervener/Purchaser did, and having obtained the required leave, proceeded with the present appeal, it being the only appeal before us.

Such being the case, it is unnecessary to delve too deeply into the issues which arose for decision before the High Court and the Court of Appeal in the dispute between Father and his faction on the one hand, and the Mother and her faction on the other. The contest between Intervener/Purchaser and the Father and his faction will, however, require a special focus.

The Facts

It will suffice if we say, that the Family Company was incorporated by the Father and the Mother in 1962 and they were its initial subscribing shareholders and directors. The Father was also the Chairman and Managing Director of the Family Company which had an authorised capital of RM2.5 million, divided into 25,000 shares of RM1 each, and its registered address was at No. 22, Tan Sri Road, Sibu, Sarawak East Malaysia. The Family Company was engaged in the business of *inter alia*, the purchasing and acquiring of lands, buildings and plantations in Johore and Sarawak. From time to time, the Father injected capital into the Family Company and it prospered.

In 1973, the Father transferred the disputed properties to the Family Company for a consideration of RM10,000 per acre amounting to RM366,250. As each of his children by the first marriage attained the age of majority, he caused the Family Company to allot shares in it to each such child, but almost contemporaneously, he obtained from each such child signed but undated transfer forms in blank which he held together with all relevant share certificates. The children paid nothing for these shares. In 1973, the eldest child of the Father and the Mother was Catherine, the Eighth Respondent, who was 18 years of age.

The natural gifts of the children of the Father and the Mother were such that they all excelled academically and, except for the Eldest Son Peter, none of the others assisted the Father in the management of the Family Company. The Mother was the Secretary and a director of the Family Company, a businesswoman and educated.

It is right to say that this was a Family Company of professionals. There was, however, an outsider who was a director and shareholder of the Family Company. We refer to the Second Wife Rahimah who the Father married according to Muslim Law on 26 May 1990 in Thailand and by whom he had children.

According to the Mother, prior to 17 April 1990, the Second Wife Rahimah was an employee of the Family Company. It was common ground that the Second Wife Rahimah was the registered shareholder of 11,658 shares of RM100 each, in the Family Company, the relevant share certificates being all

dated 20 April 1988 and that she became a director of the Family Company in 1989. A pre-requisite for membership of the board of the Family Company was ownership of its shares.

On 17 April 1988, the Second Wife Rahimah had executed two deeds of irrevocable Powers of Attorney; one in favour of the Eldest Son Peter and his brother Paul who are, as we have said, the Seventh and Eighth respondents, respectively. Contemporaneously, she had also executed two declarations of Trust and Deeds of Power of Attorney in favour of the Eldest Son and his brother Paul. By the deeds of Power of Attorney and the Declarations of Trust, in favour of the Eldest Son, she had declared that she held 6,400 shares in trust for him. Similarly, by the other deed of Power of Attorney and Declaration of Trust, in favour of the Eldest Son's brother Paul, she likewise had declared that she was holding the balance of 5,259 shares in trust for him.

In March 1988, ie, before the execution of these Powers of Attorney, the Father caused to be incorporated a company known as Rahimah Dollah Holdings Sdn. Bhd. It is not in dispute that although the contemporary records showed that the Second Wife Rahimah was shown as its principal shareholder, its business and affairs were entirely under the control of the Father. From about December 1989 until about May 1990, the Father had transferred funds in excess of RM600,000 from the account of the Family Company to Rahimah Dollah Holdings Sdn. Bhd. It would appear that there was no, or no proper, resolution by the family company's board authorising these transfers.

In April 1990, the breakup of the family became obvious when there was quarrel between the Father on the one side, and the Mother and the Eldest Son on the other. The quarrel was because the Father had evinced an intention to many the Second Wife Rahimah.

As a result of that quarrel, the Father had left the family home in Singapore without leaving a forwarding address. When the Father appeared to have vanished without trace, the Mother had made a police report on 28 May 1990. Two days before that – that is to say, on 26 May 1990 – unbeknown to the Mother and members of the family, the Father had married the Second Wife Rahimah in Thailand according to Muslim Law. This was the event which precipitated the battle for control of the Family Company, with each side resorting to various board meetings and annual extraordinary meetings to achieve their purpose.

At the time the battle lines were drawn – that is to say *just before* the attempted take over of the Family Company by the Mother and her faction on 17 April 1990, the respective shareholders of the Family Company and their shareholdings were as follows:

Shareholders of the Family Company and their respective shareholdings on or before 17 April 1990, being the date of the alleged take over

	No. of shares
1. Chang Ching Chuen (the Father – 1st Plaintiff)	2
2. Rahimah bte Dollah (the Second Wife – 2nd Plaintiff)	11,658
3. Chang Ching Hong (brother of the Father – 3rd Plaintiff)	1,100
4. Yap Poh Eng (f) (the Mother -2nd Defendant)	40
5. Peter Chang Chee Chi (the Eldest Son – 3rd Defendant)	100
6. Paul Chang Chee Cheng (the Other Son Paul – 4th Defendant)	100
7. Amy Chang Chee Chin (f) (the Daughter Amy – 5th Defendant)	3000
8. Pearl Chang Chee Siang (f) (the Daughter Pearl – 6th Defendant)	3,000
9. Jenny Chang Chee Ning (f) (the Daughter Jenny – 7th Defendant)	3,000
10. Catherine Chang Chee Jian (t) (the Eldest Daughter Catherine - 8th Defendant)	3,000
	25,000

The Directors of the Family Company prior to 17 April 1990 were as follows:

1. Chang Ching Chuen (the Father)
2. Rahimah bte Dollah (later the Second Wife)
3. Yap Poh Eng (the Mother)
4. Chang Ching Hong (brother of the Father)
5. Peter Chang Chee Chi (Eldest Son Peter)

The Secretary of the Family Company was the Mother.

We must now refer to the Family Company's board meeting held on 17 April 1990 in Singapore. For convenience, we shall refer to certain passages in the Judgment of the trial Judge as to what had transpired at this board meeting, and regarding which there was no dispute:

Family Company's "Meeting of the Board of Directors on 17 April 1990 in Singapore

At this Board meeting attended by the Mother and the Eldest Son, it was resolved:

1. That the share certificate numbers 55, 56, 79,80, 83, 84, 85, 86, 87, 88, 91, 92, 90, 93, 94, 95, 96 and 97 be and hereby declared null and void.

2. That the following transfer of shares in the Company be and they are hereby approved and that the common seal of the Company be affixed to the new certificates.

Serial No. of old shares	Transferer	Transferee	Serial No. of new shares
55,56,79 and 80	Amy Chang Chee Chin	Ong Li Mei	99
83,84,85 86,87,88 91 and 92	Peter Chang Chee Chi	OngLi Mei	101
90,93,94 95, 96 and 97	Paul Chang Chee Cheng	OngLi Mei	100

3. That pursuant to Article 69(a), Rahimah bte Dollah (I/C No. 5814759) of 26, bt. Jalan Pontian, Pekan Nenas, Johor, Malaysia shall cease to be a Director of the company with effect from 17 April 1990.

4. That pursuant to Article 81, the following be and they are hereby appointed Directors of the company with effect from 17 April 1990:

   Paul Chang Chee Cheng

   Amy Chang Chee Chin

   Ong Li Mei.

Thus, *after* the alleged take over of the Family Company by the Mother and her faction on 17 April 1990, the shareholders of the Family Company and their respective shareholdings were as follows:

Shareholders of the Family Company and their respective shareholdings after 17 April 1990

	No. of shares
1. Chang Ching Chuen (the Father – 1st Plaintiff)	2
2. Rahimah bte Dollah (the Second Wife – 2nd Plaintiff)	nil
3. Chang Ching Hong (brother of the Father – 3rd Plaintiff)	1,100
4. Tiong Kim Siong (4th Plaintiff)	1
5. Yap Poh Eng (f) (the Mother – 2nd Defendant)	39
6. Peter Chang Chee Chi (the Eldest Son – 3rd Defendant)	100
7. Paul Chang Chee Cheng (the Other Son Paul – 4th Defendant)	100
8. Amy Chang Chee Chin (f) (the Daughter Amy – 5th Defendant)	142
9. Pearl Chang Chee Siang (f) (the Daughter Pearl – 6th Defendant)	3,000
10. Jenny Chang Chee Ning (f) (the Daughter Jenny – 7th Defendant)	3,000
11. Catherine Chang Chee Jian (f) (the Eldest Daughter Catherine – 8th Defendant)	3,000
12. Ong Li Mei (f) Wife of the Other Son Paul – (9th Defendant)	14,516
	25,000

According to the relevant Annual Return in the prescribed Form 49 lodged with the Registry of Companies pursuant to s. 141(6) of the Companies Act, 1965 ('the Act'), the Directors of the Family Company with effect from 17 April 1990 were:

1. Chang Ching Chuen
2. Rahimah bte Dollah
3. Yap Poh Eng
4. Chang Ching Hong
5. Peter Chang Chee Chi

The Secretary of the Family Company with effect from 17 April 1990 continued to be the Mother.

On 10 May 1990 and 26 May 1990 two board meetings of the Family Company were held. For convenience, we shall refer to the following passage in the judgment of the Court of Appeal, as to what transpired at these meetings and regarding which there was no dispute:

> On 10 May 1990 a meeting was held at which the second third, fourth, fifth and ninth defendants were present. At that meeting the first Plaintiff was removed as the managing director and the second, third and fifth defendants were appointed as managing directors. About two weeks later, that is to say, on 26 May 1990, the re-constituted board met and resolved that the six lots of land belonging to the first Defendant be sold. Authority was then given to the second, third and fifth defendants to sell the lands either by public auction or by private treaty. These defendants were also authorised to execute under seal all relevant documents to give effect to any such sale. By a coincidence, on the same date, ie, 26 May 1990, the first Plaintiff married the second Plaintiff in Thailand according to Muslim law.

On 6 September 1990, the Father had presented and caused to be registered a private caveat ('the First Caveat') against the disputed properties. The statutory declaration made by the Father in support of his application in Form 19B prescribed by the National Land Code, 1965 ('the Code'), for entry of the caveat is important, and was in the following terms:

> I, CHANG CHING CHUEN care of No. 22, Tan Sri Road, Sibu, Sarawak, East Malaysia do hereby solemnly and sincerely declare as follows:
>
> 1. I am the Chairman and Managing Director of Aik Ming (Malaysia) Sdn. Bhd., a company incorporated and registered in Malaysia under the Companies Act, 1965 and having its registered office at No. 22, Tan Sri Road, Sibu, Sarawak (hereinafter referred to as 'the said Company').
> 2. The said Company is the registered proprietor of the lands described in the Schedule hereto (hereinafter referred to as 'the said Lands').
> 3. *The title deeds of the said lands have been lost or mislaid or taken away by unauthorised person or persons.*

4. *In order to prevent unauthorised dealings in the said lands or any part thereof, I pray that a Caveat be lodged against the said lands by the said Company.*

(Italics supplied)

In the words of the Court of Appeal on 3 December 1990 the following events had occurred:

> On 3 December 1990, the formal sale and purchase agreement was executed. It is expressed to have been made between the first Defendant ('the Family Company') and the Intervener ("the Purchaser"). In accordance with the well recognised conveyancing practice that obtains in this country, six memoranda of transfers in Form 14A were executed purportedly by the first Defendant as vendor simultaneously with the execution of the sale and purchase agreement.
>
> This was done for the purpose of obtaining from the Collector of Stamp Duties, an adjudication of the stamp duty payable upon the instrument of transfer. These transfers were to be held in escrow pending the completion of the sale. The common seal of the first Defendant ('the Family Company') was placed on the instruments of transfer and was witnessed by the signatures of the second and third defendants ("the Mother" and "the Eldest Son", respectively. The intervener ("the Purchaser") placed its common seal on the six memoranda of transfer on 8 December 1990. Soon after the execution of the sale and purchase agreement, Dato Tan ("the Managing Director and alter ego of the Purchaser Company") commenced improvements to the lands in question.

Again in the words of the Court of Appeal on 22 December 1990 the following events had occurred:

> On 22 December 1990, the Collector of Stamp Duties assessed the *ad valorem* stamp duty payable on the six memoranda of transfer at RM5,002,968.75, that is to say about RM200,000 more than the price supposedly agreed upon between the parties.

On 29 December 1990, an extraordinary general meeting of the Purchaser Company was held at which was passed the following resolution:

> WHEREAS Mr. Tan Eng Chia had on 3rd December 1989 (sic) signed an agreement on behalf of the Company to purchase the following pieces of land situated in the Mukim of Jeram Batu in the State of Johor together with the building erected thereon for a total consideration of Malaysian Ringgit Four Million Eight Hundred Thousand only RM$4,800,000).
> [There then follows a recital of the particulars of the six lots].
>
> IT IS HEREBY RESOLVED that the said transaction be and is hereby ratified by the Company.

On the same day (29 December 1990), the Father had presented and caused to be registered a Second Caveat ('the Second Caveat') against the disputed properties. Omitting formal parts, the statutory declaration in support of his application in Form 19B for the caveat was in the following terms:

> 1. I am the Managing Director of M/S. AIK MING (MALAYSIA) SDN. BHD having a registered office at No. 22, Tan Sri Road, Sibu, Sarawak, East Malaysia hereinafter referred to as 'the said Company').
>
> 2. By an Extraordinary General Meeting of the said Company held on the 11th July, 1990 it was resolved that I be reconfirmed/reappointed in the Company as the sole Managing Director of the said Company.
>
> 3. The other shareholders of the said Company are family members who are holding the majority shares of the said Company in trust for me by enjoyment as beneficial owner and who have executed the necessary transfer forms in my favour.
>
> 4. The said Company owns assets in West Malaysia and these assets include real property in Pontian, namely... [and there follows particulars of the disputed properties].
>
> 5. *In view of recent disputes between me and other shareholders, I have good reasons to believe that the other shareholders in the said Company are making attempts to dispose of the landed assets of the said Company without my knowledge, consent and approval.*
>
> 6. *I verily believe that the landed assets of the said Company are presently in jeopardy and this caveat is lodged to protect both the personal and corporate interest of the said Company.*
>
> (Italics supplied)

Looking back, according to the testimony of Dato Tan, the Managing Director of the Intervener/Purchaser, he had dealt with a broker named Queck in respect of the sale and purchase of the disputed properties through one Lai. The price initially quoted was RM6 million but, after negotiation on the telephone, was knocked down to and agreed at RM4.8 million. An option to purchase was then granted by the Mother to Dato Tan to purchase the disputed properties at a price of RM4.8 million. The consideration for the option was RM100,000 which was paid in cash in Singapore to the Mother, who as we have said, was a director of the Family Company, receipt thereof having been duly acknowledged in the option on behalf of the Family Company. Payment in cash in Singapore was made at the behest of the Mother who like her faction were Singaporeans.

On 8 November 1990, Ms. K.H., Choo & Co. Advocates and Solicitors, acting for the Intervener/Purchaser, had exercised the option by a letter of the same date addressed to Ms. Yeo, Tan Hoon & Tee Advocates & Solicitors, who said that they were acting for the Family Company, annexed to which was a cheque for MR568,000 as part of the purchase price and a draft of the proposed sale and purchase agreement. Then followed an exchange of letters between the Solicitors, whereby the terms of the agreement were quickly settled. In the meanwhile, the Solicitors for the Intervener/Purchaser presented and caused to be registered a caveat against the disputed properties to protect their interest therein pending completion.

On 1 December 1990, it was said that a meeting of the board of directors of the Family Company was held. For convenience we shall quote from the judgment of the Court of Appeal as to what transpired at this meeting:

> It was noted that Mdm Yap Poh Eng, Miss Amy Chang & Mr. Peter Chang, having been duly authorised by the Board of Directors on 26 May 1990 to act on their behalf, reported that the company has sold the six (6) pieces of properties held under Geran 16210, Lot 1832, G.M. 276, Lot 876, G.M. 272, Lot 877, G.M. 273, Lot 773, G.M. 274, Lot 874 and G.M. 275, Lot 875 all in the Mukim of Jeram Batu comprising a total area of 53A, 2R, 12P or thereabout ("the disputed properties") at the selling price of Malaysian Ringgit Four Million and Eight Hundred Thousand (M$4,800,000.00) to M/S Pekan Nenas Industries Sdn Bhd. of Suite 138, 1st Floor, Johor Tower, 80100 Johor Bahru, Johore subject to the terms and conditions set out in the sale and purchase agreement concerned.
>
> It was resolved:
>
> That any two (2) directors or one director and a secretary be and are hereby authorised to execute all relevant documents on behalf of the Company.
>
> That the Common Seal of the Company be affixed to all relevant documents relating to the sale in accordance with the Articles of Association of the Company.

The case for the Intervener/Purchaser as presented in the High Court and the Court of Appeal was that at all material times it was a *bona fide* Purchaser for value without notice actual or constructive of the family squabble hereinbefore mentioned. It is clear law that the onus as to this, was on Intervener/Purchaser to establish. The oral evidence adduced in support of the Intervener/Purchaser's claim appears from the following extracts taken from the testimony of Dato Tan, who as we have said, was the Managing Director and alter ego of the Intervener/Purchaser.

Touching on the purchase of the option, why he had paid a deposit of a sum greater than the customary 10% of the purchase price and when he retained Solicitors to act for him in the matter of sale and purchase transaction, Dato Tan said this:

> After having agreed at the price I instructed my Manager, Mr. Phang, to pay RM100,000 for the option. The RM100,000 was paid in cash in Singapore. This was done on 26 October 1990. For the purchase of the property both parties did not agree to a deposit of 10%. I initially proposed a deposit of 10% to be paid and the other side proposed a deposit of RM1 million. Finally we agreed to a sum of RM668,000 as deposit to be paid to the seller. We chose the figure 668 as I thought it means prosperous all the way. After I obtained the option then I appointed Solicitors to handle the deal. The Solicitors were M/s. K.H. Choo & Co.

Touching on when and how he got to know of the First Caveat, his Solicitors' advice thereon, what inquiry he had made in consequence and the result of that inquiry, Dato Tan said this.

> In November 1990 M/s. K.H. Choo informed us, of the caveat on the lands. Mr. Choo told me that the 1st Defendant company had lodged a caveat on the ground that the title deeds were missing. Mr. Choo's advice was that there should not be any problem to removed the caveat. I then confirmed with Madam Yap through the phone. She told me that she had the title deeds.

It will be recalled that the Sale and Purchase Agreement in respect of the disputed properties had been signed on 3 December 1990. So, at the time the sale and purchase agreement was executed, Dato Tan, as alter ego of the Intervener/Purchaser, knew of the First Caveat, the contents of the statutory declaration filed in support thereof and the explanation by the Mother, who was the Secretary of the Family Company, that she had the title deeds – an explanation which subsequent events showed was true.

Touching on when and how he got to know of the Second Caveat, his solicitor's advice thereon, why he paid the balance of the purchase price, his reaction when he came to know that the Second Caveat remained in place despite this payment, and the events which immediately followed, he said this:

> In January or February 1991 Mr. Choo informed me of the Second Caveat. Mr. Choo advised me that there should not be any problem to remove the Second Caveat. In February 1991, I paid RM4.132 million, the balance of the purchase price to the vendor. Mr. Choo advised me to do so. After I paid the balance of the purchase price I was told by Mr. Choo that the caveat was still subsisting. I then called the 2nd Defendant (the Mother) and scolded her over the phone that she was conspiring or colluding with her husband to cheat me. 2nd Defendant promised me that she would explain to me in Johor Bahru. The

> money was returned to M/s. K.H. Choo & Co. before the 2nd Defendant met me. RM4.132 million was returned to M/s. K.H. Choo & Co. On learning of this I was very angry and again I called up the 2nd Defendant and scolded her. 2nd Defendant was scared and I threatened to institute legal action against her and she promised to come the next day. She came the next day with Peter (3rd Defendant) to my office. At the meeting in my office I scolded her and it took her 3 hours to explain. The meeting took 3 hours and not the explanation. At the conclusion of the meeting 2nd Defendant said that she was sincere in wanting to sell the lands to me and she undertook to remove the caveat. Before making further proposal I called up Mr. Choo to find out whether there was really any problem to remove the caveat and Mr. Choo told me that there was no problem. I told 2nd Defendant that the option had lapsed and we have to settle the deal as soon as possible. I even proposed whether to pay in Malaysian Ringgit or Singapore Dollar or in cash or cheque to settle the balance of the purchase price. 3rd Defendant proposed cash in Singapore Dollar be paid as it would be more convenient.

Reverting to the question, why he was keen on purchasing the disputed properties and the improvement he had effected thereon while his company was a Purchaser pending completion, Dato Tan said this:

> I intended to buy those lands as they were near my lands and I spent money to improve the lands that I intended to purchase. Old rubber trees were fell down plus earthworks. I spent about half a million on those lands.

He maintained that there had been no conspiracy between himself and the Mother or the Eldest Son Peter in respect of the purchase of the disputed properties and on this issue, the Court of Appeal found in his favour. As regards this finding, there was no cross-appeal by the Father or his faction.

When cross-examined as to when he got to know of the family squabble, Dato Tan said this:

> At the time of signing of the Sale and Purchase Agreement I did not know of the squabble amongst the shareholders of 1st Defendant company. One year after the signing of Sale and Purchase Agreement and the title deeds could not be transferred into my company's name I came to know of the squabble.

Explaining why he had paid the balance of the purchase price inspite of knowing of the existence of the Second Caveat Dato Tan said this:

> In February 1991 I paid the balance of the purchase price as I was advised by my Solicitors to do so otherwise the deposit would be forfeited under Sale and Purchase Agreement.

Amplifying this last point Dato Tan added this:

> I paid the money in spite of the fact that 2nd Defendant could not give me the property free of encumbrances. I did so only after the meeting with the 2nd and 3rd defendants and they were so sincere that they wanted to sell the lands to me and I need to save my face as the people in Pekan Nanas knew of my purchase of the lands. Further I spent half a million to improve the lands coupled with the fact that my lands were near to those lands. So I decided to purchase the lands when Mr. Choo promised me there would not be any problem to remove them.

The documentary evidence adduced in support of the Intervener/Purchaser's claim that it was a *bona fide* Purchaser for value, consisted of the compulsory public documents lodged on behalf of the Family Company, in the Registry of Companies, namely, the Annual Return in Form 49 the Memorandum and Articles of Association which constituted public notice of the authorised officials of the Family Company and of its powers to contract. Additionally, the Intervener/Purchaser relied upon a document which, taken at its full face value, was a resolution of the board of directors of the Family Company dated 26 May 1990 which authorised the sale of the disputed properties to it.

The Rival Contentions Of Counsel

In support of his contention that both the trial Judge in the High Court and the Court of Appeal had erred in Law when concluding that the Intervener/ Purchaser was not a *bona fide* Purchaser for value, Dr. Das advanced the following submissions:

1. Under the Rule in *Turquand's* case (*Royal British Bank Ltd v. Turquand* [1856] 119 ER 474) there is no duty cast upon an outsider contracting with a company to conduct an investigation as to the capacity or power of the company officials dealing with him other than to rely on what is disclosed by the company's documents, namely, Form 49 and the Memorandum and Articles of the Family Company.

2. That the Rule in *Turquand's* case must relate to the doctrine of constructive notice provided by documents like Form 49 and the Articles of Association of the Family Company which are compulsory documents to be filed by any company in the Registry to constitute public notice of the authorised officials of the company and of its powers to contract. (See, *K.L. Engineering Sdn. Bhd. & Anor. v. Arab Malaysian Finance Bhd.* [1994] 2 MLJ 201, FCt]

3. That an outsider like the Intervener/Purchaser was entitled to rely upon a company resolution which is *ex facie* valid without having to investigate the legality or otherwise of the adoption of the said resolution.

4. That the Articles of the Family Company did not place any restriction on the contracting power of company officials so that it could not be said that only the managing director, i.e, the Father (the First Respondent), could sign on behalf of the Family Company or be necessarily involved in all its contracts.

5. That the issues here must be examined realistically with regard to the state of affairs then prevailing within the Family Company, namely that the family break up was being played out on the company front with the Father (the First Respondent) transferring without any authorisation from the board a sum of nearly RM600,000 of company funds to his personal company called Rahimah Dollah Holdings Sdn Bhd set up jointly with the Second Wife.

6. That having found that there was no basis for a case of conspiracy against the Purchaser, the Court of Appeal had erred in law in drawing a conclusion merely by inference that the Intervener/Purchaser was not or could not be a *bona fide* Purchaser.

7. The Court of Appeal had further erred in law in concluding that one is not a *bona fide* Purchaser until the purchase price is paid in full.

8. The Court of Appeal had further erred in law by holding or misapplying the rule that knowledge of the solicitor is deemed to be knowledge of the client in the present situation where it is invoked to disqualify the client from being a *bona fide* Purchaser.

9. In any event, the Privy Council decision in *Waimiha Sawmilling Company Ltd v. Waione Timber Company Ltd* [1926] AC 101 establishes that knowledge alone of an adverse unregistered interest does not make the purchase and the registration thereof impugnable under the Torrens system of land registration.

On the other hand Mr. P.K. Nathan (assisted by Mr. Parthiban) Counsel for the Father advanced the following submissions

1. The Court of Appeal was correct in its conclusion that the Rule in *Turquand's* case did not apply to the facts of the instant case.

2. The Purchaser Company was not entitled to rely on the Rule in *Turquand's* case having regard to the fact it had obtained the Memorandum and Articles of Association of the Family Company only on 15 March 1991, which was about three months after the signing of the sale and purchase agreement on 3 December 1990.

3. The Purchaser company had full and actual knowledge that the disputed properties were sold by unauthorised persons of the Family Company and also had knowledge of the family dispute having regard to the contents of the two statutory declarations filed in support of the first and the Second Caveat, lodged by the Father on behalf of the Family Company on 6 September 1990 and 29 December 1990, respectively.

The Pleadings

Before embarking upon a consideration of the merits of the appeal, we think it is desirable to dispose of a pleading point advanced by Counsel for the Father, somewhat belatedly, if we may say, that is to say, *after* we had reserved judgment and without the leave of the Court or the consent of his opponent. The point taken was this:

It was pointed out that the Purchaser having obtained leave of Court to intervene, never applied to be joined as a "co-Plaintiff or co-Defendant or any party to the proceedings and never obtained leave of the Court to file the necessary pleadings", such being the case, it was contended, in effect, that the evidence adduced on behalf of the Purchaser was unsupported by the pleadings and since, in a civil case, it was the duty of the Court to decide a case according to the issues disclosed by the pleadings, on this ground alone the appeal should be dismissed.

In the first place, this was a new point, which had it been raised at the outset in the Court of trial, could have been met by the Intervener/Purchaser by an appropriate application for leave to be added as a party and to deliver a pleading.

In the second place, no objection was taken to evidence being led on behalf of the Intervener/Purchaser, and the case was argued both in the High Court and on appeal to the Court of Appeal, as though the Intervener/Purchaser was a co-Defendant which had filed a pleading and it was on this basis that the case was heard and determined.

In the particular circumstances of the present case, we consider that it is too late now for Counsel for the Father to take the pleading point. The evidence had been adduced and the case argued as though the Intervener/Purchaser had been properly impleaded. Interestingly, before the trial Judge, it was Counsel

for the Intervener/Purchaser who had complained of the total absence of a properly pleaded case against it but the trial Judge gave short shrift to this objection and so did the Court of Appeal. In this regard, we need only refer to the following passage in the judgment of the Court of Appeal:

> Notwithstanding all this, the Intervener was not joined as a party to the action. Even when the intervention took place for the limited purpose of setting aside the injunction, no steps were taken by the Plaintiff to add the Intervener as a co-Defendant to the action. Neither did the intervener apply to have itself added as a party. There was no pleading delivered by the plaintiffs against the Intervener. Neither was there any pleading delivered by the Intervener. All that was placed on record was the affidavit of Dato Tan filed in support of the application to set aside the injunction. In short, every fundamental rule of practice and procedure had been flouted.

Touching on the proper course which the Intervener/Purchaser ought to have taken, the Court of Appeal said this:

> What ought to have been done is this. When the Intervener was given notice of the suit and of the injunction obtained therein, its Solicitors ought to have written to the plaintiffs' Solicitors putting them to their election: that they either add their client as a co-Defendant to the action and amend their statement of claim to raise a case against the Intervener or that an application in that behalf would be made by the Intervener. If the plaintiffs had demurred upon that request, then the application for intervention could and should have been made. In any event, when the application came to be made, there ought to have been a prayer in the summons asking for an order that the Intervener be added as a co-Defendant and for directions on the delivery of pleadings by the parties, including a direction requiring the plaintiffs to plead their case against the added co-Defendant.

After heartily agreeing with the principles as to parties enunciated by the Supreme Court in *Tajul Ariffin v. Heng Cheng Hong* [1993] 2 MLJ 143, the Court of Appeal continued:

> The intervener's complaint of the lack of a properly pleaded case against it does not appear to have come until it put in its written argument. In my judgment it came too late. The Judge dealt with it in the following passage in his judgment:
>
> > The intervener in what I would say trying to resist the prayer sought by the plaintiffs for a declaration that the sale and purchase agreement between it and the 1st defendant company be declared null and void and of no effect relied on the doctrine that it is a *bona fide* Purchaser for value and had no notice of the dispute between the shareholders/ directors of the 1st defendant company, and even if it had notice it is

> not bound to inquire into the internal affairs of the 1st defendant company. Further, the counsel for the intervener contended that the issue of the conspiracy of the intervener with the 2nd to 9th defendants and the intervener was not a *bona fide* Purchaser could not be relied by the plaintiffs as they were not so pleaded by the plaintiffs. As the intervener was not ordered to be made a party, such contention cannot in the circumstances be accepted as no consequential action was taken under O. 15 r. 8 of RHC. *Hence, it is just and proper that all evidence available should be considered by the court in determining the claim of the intervener that it is a bona fide purchaser and that it had no notice of the dispute between the shareholders directors of 1st defendant company.*
>
> (Italics supplied).

The Court of Appeal then concluded:

> It is clear as can be from this passage that the Judge took the proper course, and indeed, the only course open to him at that stage. It would have been too much to have expected of him to re-open the whole case and direct the proper addition of the Intervener as a co-Defendant and for the service of the process and pleadings upon it. It was for the Intervener to have taken the point at the earliest available opportunity. But its legal advisers did not think it is necessary to do so. In these circumstances, the learned Judge adopted the course best suited to the attainment of justice and no criticism may be properly directed against him on that score.

We would uphold the views expressed by the Court of Appeal as regards this part of the case, and we would add, that since what is sauce for the goose is sauce for the gander, the same considerations would apply, *mutatis mutandis*, when it is Counsel for the Father, who takes the point, at this very late stage, that it is the Intervener/Purchaser who should be penalised for not having applied to be added as a party and to deliver a pleading. In our view, in the particular circumstances of the present case, especially the history of the proceedings, the point taken by Counsel for the Father is quite untenable.

Merits of the Appeal

We now turn to consider the merits of the appeal.

In considering this appeal, we think it is right to say, at the risk of being trite, that like the Privy Council, we adhere to the principle that a trial Court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses so that we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so. (See *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212). However like

the Privy Council, we will more readily interfere with the trial judge's inferences based on his findings as we would be in an equally good position as the trial Judge to make the determination. (See *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] MLJ 87, at p. 94, citing with approval *Benmax v. Austin Motor Co Ltd* [1955] AC 370, and followed recently by this Court in *China Airlines Ltd. v. Maltran Air Corp. Sdn. Bhd.* [1996] 2 MLJ 517). There is a third point of principle which concerns the approach of the Privy Council, to which we also adhere namely that it will not as a general rule, entertain appeals from concurrent findings of fact by the Court of Appeal and the High Court. (See *Tominan bte Tukimin v. Toh Kai Chup* [1989] 2 MLJ 257). The very narrow exceptions to this last mentioned rule appear from the headnote to the judgment of the Board in *Srimati Bibhabati Devi v. Kumar Ramendra Narayyan Roy* [1946] AC 508 applied in Tominan).

Both in the High Court and in the Court of Appeal the key issue for determination was whether at the material time the Purchaser was a *bona fide* Purchaser for value. The whole of the material on this question was examined before us with great care and it is unnecessary to discuss it again at any length.

Now, the main plank in the argument advanced by Dr Das for the Purchaser was the Rule in Royal *British Bank v. Turquand* [1856] 119 ER 474, which protects outsiders dealing with a company in good faith who are entitled to *assume* that acts within its constitution and powers have been properly performed, and are not bound to inquire whether acts of internal management have been regular.

At this point, we would interpolate to observe that the effect of the Rule in *Turquand's* case is that it reduces the enquiries which outsiders having dealings with a company – or more correctly – outsiders who reasonably think they are having dealings with a company – must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering (*Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* [1895] 1 Ch. 629 at 636 per Lindley LJ) and it is this which provides the legal basis for the Rule.

In *Turquand*, the deed of settlement (corresponding to the modern articles of association) had given permission to borrow subject to a general resolution of the company authorising the same. The bank had lent money to the company upon the security of a bond signed by two directors and given under the seal of the company. In an action brought by the Bank to recover the

money lent, the company had contended that no resolution of the kind required had been passed. In reply, the lender relied on the usual authority of directors. The Court of Exchequer Chamber held that the lender was entitled to succeed; this was because the company was bound by the contract since the bank was entitled to *infer* that the necessary resolution had been passed.

In this context, provisions in articles which provide that the seal of a company shall be affixed only pursuant to a resolution of the board or a committee of the board and attested by a director and the secretary or a second director: Table A Companies Act 1965, Art. 96, seem clearly a matter of the company's internal management despite suggestions to the contrary in *S. London Greyhound Racecourses Ltd. v. Wake* [1931] 1 Ch. 496; see *County of Gloucestor Bank v. Rudry Merthyr Colliery Co.* [1895] 1 Ch. 629 CA. Furthermore, if a board meeting is irregular because proper notice of it was not given in advance to each director there can be no doubt that the outsider who is the other party to the transaction would not be affected by the irregularity, if he had no knowledge of it (see, *Browne v. La Trinidad* [1887] 37 Ch. D1) and the transactions would be binding on the company. This makes good sense because the outsider has no means of knowing whether the prescribed notices had been sent.

In the present case, there was much discussion both in the High Court and in the Court of Appeal regarding the validity of the meeting of the Family Company held on 17 April 1990 in Singapore hereinbefore referred to, attended only by the Mother and the Eldest Son on the ground of non-notice and non-receipt of the agenda for that meeting to the Father and his faction, and consequently about the validity of the resolutions passed at that meeting and, consequently, the resolution purporting to authorise the sale of the disputed properties to the Intervener/Purchaser passed on 26 May 1990. As we have earlier noted, the High Court found that these irregularities nullified the meetings and all resolutions passed thereat, and most importantly, from the Intervener/Purchaser's point of view, it granted a consequential declaration setting aside the sale of the disputed properties by the Family Company to the Intervener/Purchaser. Agreeing with the High Court, the Court of Appeal said this:

> "Given the finding of fact by the learned Judge that the notice convening the meeting of 17 April 1990 was not served on the plaintiffs – a finding that I accept as being entirely proper – and having regard to the true principle of law that is to be applied, I am satisfied that the conclusion reached by the learned Judge, namely that the meeting and all the business conducted thereat were utterly void, is correct. It follows that the submission by Counsel on this point is unacceptable. The business conducted at the subsequent meetings of

the first defendant's board are dependent for their validity upon the propriety of the meeting of 17 April 1990. That meeting having failed to stand up to curial scrutiny, these later meetings are also void and useless and the learned Judge was right in so holding.

With profound respect to the Court of Appeal, at the time of the execution of the sale and purchase agreement dated 3 December 1990, unless there was proof that the Intervener/Purchaser knew or ought to have known of the irregularities with regard to the meeting of 17 April 1990, referred to in the above passage of the judgment of the Court of Appeal, it is difficult to see how the contention advanced on behalf of the Intervener/Purchaser, that it is entitled to rely on the Rule in *Turquand's* case, could have been rebutted.

We note, in passing, that the trial Judge declined to validate the board meeting of the Family Company held on 17 April 1990 in Singapore, in regard to which the Father, the Second Wife, and the Father's brother, were not given notice, on the ground that they had been prejudiced by the lack of notice. In so holding, the learned Judge relied on *First Nominee (Pte.) Ltd. v. New Kok Ann Realty Sdn. Bhd.* [1983] 2 MLJ 76 which is authority for the proposition that the Court's power to validate improperly-called meetings under s. 355 of the Companies Act 1965, cannot and will not be exercised where there is injustice to members who did not attend.

With respect, these considerations are irrelevant, where, as here, outsiders who believe they have entered into transactions with the company, are not aware if a board meeting is irregular because proper notice of it was not given in advance to each director, since they would not be affected by an irregularity if they have no knowledge of it. (*Browne v. La Trinandad* [1887] 37 Ch. D 1). To put it another way, such an outsider may rely on the Rule in *Turquand's* case which, when it applies, gives rise *to an irrebutable presumption*, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorised.

The rule in *Turquand's* case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity.

More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule. (See, *Howard v. Patent Ivory Manufacturing Co.* [1888] 38 Ch. D 156). This is an exception to the Rule in *Turquand's* case and the burden of establishing it lies on the party invoking the exception and in this case that would be the Father and his faction.

Furthermore, outsiders dealing with a company would also be affected by knowledge of facts which would put a reasonable *person on inquiry;* in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B. Liggett (Liverpool) Ltd. v. Barclays Bank Ltd.* [1928] 1 KB 48, 56 Wright J (as he then was) said:

> Whatever may be the exact scope of the rule in *Turquand's* case I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied on by a person who has been put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the *prima facie* presumption, then it is clear, I think, that he cannot claim the benefit of the rule ... .

And, in *Morris v. Kanssen* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the *Turquand* Rule if he is put upon inquiry. Here is what his Lordship said on this point (at p. 475):

> He cannot presume in his own favour that things are rightly done if in inquiry that he ought to have made would tell him that they were wrongly done.

So also an outsider dealing with a company cannot invoke the benefit of the *Turquand* Rule if he could or should in the circumstances have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies which are open to public inspection. (See, *Irvine v. Union Bank of Australia* [1877] 2 App. at 366).

The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v. Rialto (West End) Ltd.* [1944] Ch. 346; *Morris v. Kanssen* [1946] AC 459.)

We need hardly add that the Rule in *Turquand's* case is designed to protect not the company itself, but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the Rule, as a defence. (See, *Howbeach Coal Co. Ltd. v. Teague* [1860] 5 H to N 151; *Garden Gully United Quarry Co. v. McLister* [1875] 1 App. at 39).

So far as the burden of proof is concerned, when the doctrine of the *bona fide* Purchaser for value without notice is invoked, we are inclined to the view that the burden of showing lack of notice is on the person invoking the doctrine. (See, *Ninety - Five Pty Ltd v. Banque Nationale de Paris* [1988] WAR 132; cf *Re Dover Pty Ltd* [1981] 6 ACLR 307, 310).

Whether or not the outsider was put on notice is a question of fact on which other cases are of no assistance.

When, as in this case, it is alleged that the circumstances raised a doubt regarding a possible *abuse of power*, the purpose of inquiry is not to ascertain that the transaction is in fact regular but merely to negative or neutralise the circumstances of suspicion. The outsider is entitled to enforce the contract provided that he acts in good faith and without notice that the authority is being abused. It follows that *reasonable explanations given by the agent in answer to inquiries would in such a case suffice.* (*A.L. Underwood Ltd. v. Bank of Liverpool* [1924] 1 KB 775).

However when there is doubt regarding the *existence of power* the outsider who is put upon inquiry cannot proceed until he has ascertained that actual authority exists or fresh material is disclosed upon which to base a claim of ostensible authority. In such a situation, assurances by an agent that he has authority will not suffice to found a plea of estoppel against the company. *Consequently, reasonable explanations given by an agent will not help the outsider.* (See *A.L. Underwood Ltd v. Bank of Liverpool (supra)*).

The very nature of a proposed transaction may put a person on inquiry as to the authority of the directors to effect it even if he has no special relationship with the company. (See *Rolled Steel Ltd. v. British Steel Corporation* [1986] Ch. 246, at p. 285). So for example, in *Northside Development Pty Ltd v. Registrar General & Ors.* [1989-1990] 170 CLR 146, (High Court Australia) the bank was put on inquiry because there was a pledging of an asset by a company for no known or likely commercial reason, and for the known purpose of benefiting someone else, in particular, to secure an advance to a third party without any indication that the advance was for the purpose of the company's business. Accordingly, it was held that the Rule in *Turquand's* case did not prevent the company from relying on the fact that the mortgage was executed without its authority. Touching on the various situations in which the Rule applies to provide certainty in the mind of outsiders contracting with the company, Brennan J in Northside Developments said this (at p. 178):

> … It covers each of the links between the constitution of the company and the particular act (or omission) done or (omitted) by a purported officer or agent of the company in the transaction. It covers the due making of appointments of the original directors, of subsequent directors, of other officers and agents; it covers the conferring of authority on officers and agents; and it covers the satisfaction of conditions governing their exercise of authority in the instant case.

Whether in any given case, the person dealing with a Company is put upon inquiry must depend upon all the particular circumstances (per Glade LJ in *Rolled Steel Ltd, ibid* at p. 285).

The *policy* underlying the *Turquand* Rule is business convenience and the formulation and application of the Rule "call for a fine balance" (*Northside Developments* case *supra*) between the competing interests of outsiders contracting with companies on the one hand, and innocent creditors and shareholders of companies, on the other.

We must add that where an outsider has been put on inquiry but has failed to inquire, it is not open to him, to argue that even if inquiry had been made, the result would not have disclosed the want of authority or other irregularity. So, for example, in *Chapleo v. Brunswick Permanent Building Society* [1881] 6 QBD 686, at p. 715 Baggallay LJ said: "The plaintiffs did not inquire; and though probably if they had inquired they would have learned nothing, yet that is their misfortune and they are debarred from recovering against the society." Similarly, per Bankes LJ in *Underwood* case *(supra)* (at p. 789).

It is with the above principles in mind that we turn to examine the key issue in this appeal, that is to say, whether at the material time the Intervener/ Purchaser was a *bona fide* Purchaser for value of the disputed properties.

As we have said, the case for the Intervener/Purchaser Company was that at all material times Dato Tan, as its alter ego, reasonably thought that he was having dealings with the Family Company and that its board had resolved that the Family Company shall enter into the sale and purchase transaction with it, and that the individual directors with whom he dealt, to wit, the Mother and the Eldest son, were merely carrying out the resolution.

More particularly, the case for the Intervener/Purchaser was that if there had been an irregularly convened board meeting whether because proper notice of it had not been given in advance to each of the directors, including the Father, or because of lack of a quorum, and as a consequence the resolution approving the transaction of sale and purchase was invalid these were irregularities which had taken place in the internal management of the company of which it as an outsider, had no knowledge actual or constructive and indeed no means of discovering the same and so it is protected by the *Turquand* Rule.

In *Mahony v. East Holyford Mining Co.* [1875] LR 7 HL 869 a decision of the House of Lords in which the *Turquand* Rule was first upheld Lord Hatherly said (at p. 894):

> When there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company.

At this point, we would pause and say, that we accept the contention of Counsel for the Intervener/Purchaser that the critical time for having knowledge of internal irregularities for purpose of the Rule in *Turquand's* case is the time of entry into the transaction. (See, *Kanssen v. Rialto (West End), Ltd. & Ors.* [1944] Ch. 346, on appeal *Morris v. Kanssen* [1946] AC 459). In the present case, that would be the date of execution of the Sale and Purchase Agreement dated 3 December 1990.

It was argued that the First Caveat was bad in law and had no legal consequences because the Father who was Managing Director of the Family Company had no legal status to caveat Company lands. In support, the case of *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189 was cited.

It would appear that the question whether an managing director has a caveatable interest to caveat company land would depend on whether he was acting on behalf of the Company or in his personal capacity. So, for example, in *Mahendran Nair & Anor. v. Patel* [1975] 2 MLJ 207, it was held that a managing director had a caveatable interest in the land of the borrower perhaps as an unregistered chargee as he was acting throughout on behalf of the chargee in the loan transaction.

Although in his statutory declaration filed in support of his application for entry of the caveat the Father did not expressly say that he was acting on behalf of the Family Company, this could be implied from the general tenor of the statutory declaration reproduced above, especially the introductory paragraph where he mentions his position in the company. But even assuming for a moment the contention of Counsel for the Purchaser regarding this part of the case were correct, and the First Caveat – and incidentally, the same considerations would apply to the Second Caveat – was bad in law, it would still be effective as notice to the world at large of its entry and the grounds thereof.

At this point, we would interpolate to observe that before the Court of Appeal, Dr. Das had submitted that the effect of a caveat was not to give notice to the world at large but merely to put the registering authority on notice of an adverse claim. In support he had cited the case of *J.H. Just (Holdings) Pty. Ltd. v. the Bank of New South Wales* [1971] 125 CLR 546, in particular the headnote at p. 547 which reads:

> The purpose of a caveat is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator, it is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest.

In response Sri Ram JCA quite correctly invited the attention of Dr. Das to the decision of the Victorian Court in *Osmanoski V. Rose* [1974] VR 523 where Gowns J pointed out that the rationale in J & J Just Holdings as to the effect of a caveat was dictated by the terms of the New South Wales statute. The attention of Counsel was also directed to the provisions of the Code dealing with caveats and he then conceded – in our view, correctly – that in the face of our statutory provisions and the general law, although the First Caveat might have been useless as a caveat, it did constitute notice to the world at large of its contents.

We therefore pass on to consider the sufficiency of the contents of the statutory declaration filed in support of the First Caveat, that is, whether it was sufficient to put the Intervener/Purchaser on inquiry and so deprive it of the protection afforded by the Rule in *Turquand's* case.

It was freely admitted that at the time he signed the Sale and Purchase Agreement, Dato Tan was fully aware of the First Caveat. But the contents of the statutory declaration by the Father filed in support of the First Caveat was, to put it mildly, rather economical with the truth. It said nothing about the breakup of the family or that the Mother's faction was not authorised to sell.

It was in November 1990 that Dato Tan had been informed by his Solicitor Mr. Choo about the First Caveat which the Father in his capacity as Chairman and Managing Director of the Family Company had caused to be presented and registered against the disputed properties. Dato Tan did seek advice from his Solicitor and he did make enquiries from the Mother on 6 September 1990.

Here is what Dato Tan said:

> In November 1990 M/s K.H. Choo informed us, of the caveat on the lands. Mr. Choo told me that the 1st Defendant company had lodged a caveat on the ground that the title deeds were missing. Mr. Choo's advice was that there should not be any problem to remove the caveat. I then confirmed with Madam Yap through the phone. She told me that she had the title deeds.

And here is what the Solicitor, Mr. Choo, said:

> When the agreement was executed in December 1990, the caveat was not disclosed as 2nd Defendant had informed me and my client that the titles were misplaced and subsequently found.

It was common ground that at the material time, the Mother did in fact have custody of the title deeds.

In our view, at best, the First Caveat raised a doubt regarding a possible *abuse of power,* and, in such a situation, as we have said, the duty cast upon the Intervener/Purchaser was *not* to ascertain whether the transaction was in fact regular but merely to neutralise the circumstances of suspicion. In other words, the duty on the outsider in such a situation was not to *investigate* as to whether the Mother and Eldest Son had authority to act on behalf of the Family Company. Accordingly, when as here, Dato Tan who reasonably thought that he was dealing with the Family Company was told by the Mother, who was the secretary of the company, that she had custody of the title deeds, this would suffice to negative or neutralise the circumstances of suspicion aroused by the First Caveat (*A.L. Underwood Ltd. v. Bank of Liverpool* [1924] 1 KB 775). We might as well add that it was but natural that outsiders dealing with a company would expect a secretary of the company to be the custodian of title deeds belonging to that company.

It is also important to note – and, with respect, this was a point which appeared to have been overlooked both by the High Court and the Court of Appeal – that on 20 November 1990, that is to say, nearly two weeks before the Sale and Purchase agreement had been executed on 3 December 1990, the Solicitor for the Intervener/Purchaser had obtained a Result of Search of the Family Company issued by the Registry of Companies which stated, *inter alia*, that according to Form 49 dated 19 April 1990 the Mother and the Eldest Son were both directors, the former being also the secretary. The testimony of the Solicitor for the Intervener/Purchaser Mr. Choo, on this point was as follows:

> I made the search before the agreement was signed. It was made on 20 November 1990 through a company called Ace Agency.

Additionally as we have said in support of its contention that it was a *bona fide* Purchaser for value, the Intervener/Purchaser had relied upon a document obtained prior to execution of the Sale and Purchase Agreement, and, indeed, prior to the issue of the Option dated 26 October 1990, which taken at its full face value, was a resolution of the board of directors of the Family Company dated 26 May 1990, authorising the sale of the disputed properties to it. In his useful work on *Company Law* (1988) p. 54, Mr. Walter Woon has correctly observed:

> A person dealing with a company should ask for a resolution of the board to confirm that the agent is in fact authorised. If he is not actually authorised, the resolution will nevertheless amount to representation by the company upon which an estoppel may be based.

If the board resolutions were impugned by reason of they having been passed at an illegally convened meeting, no proper notice thereof having been given to each director, or because there was no quorum present, this should not operate to the prejudice of the outsider who would still be entitled to rely on the Rule in *Turquand's* case, unless he knew or ought to have known of such defect. A quorum case worth citing, to illustrate this point, is *Montreal and St. Lawrence Light and Power Company v. Robert* [1906] AC 196, per Lord Macnagthen, at p. 172:

> Another point was made on behalf of the company. It seems to have been a mere afterthought, for there is no hint of it before the action was launched. It is said that the meeting of 17 July was irregular: there was not a quorum present; therefore the resolution passed on that occasion was invalid and goes for nothing. It is quite true that the by-laws require the presence of three directors to make a quorum – and only two attended on the 17th. But, after all, the by-laws of a company constituted as the *Montreal and St. Lawrence Light and Power Company* was constituted are not public property. They concern matters of internal management. Those who deal with the company have no means of access to them, no right to pry into the company's archives or interrogate its officials. There was nothing to put Robert on inquiry. The officials of the company, the president, the secretary, and the notary furnished him with a copy of a resolution which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor: 'You should not have given credit to what our people told you.' If such a plea were listened to, no one would be safe in dealing with a company having private regulations of its own inaccessible to the outside world to which appeal could be made, in case of need, to relieve it from solemn obligations or save it from a bad bargain.

We note, in passing, without placing undue stress on it, that the Court of Appeal had held that the Family Company's board meeting of 17 April 1990, was bad in Law for non-notice to the Father but overlooked the fact that the Father had left the family home in Singapore, without leaving a forwarding address.

But, much more importantly, as we have already said, if a board meeting is irregular because proper notice of it was not given in advance to each director an outsider, in the position of Dato Tan for the Intervener/Purchaser here, who would have no means of knowing of such an omission, would not be affected by the irregularity.

But, there was yet another point which concerned the time of delivery of the resolutions upon which the Court of Appeal laid much stress, to the disadvantage of the Intervener/Purchaser. Here is what the Court of Appeal said:

> It appears that the relevant resolutions were sent by the vendor's Solicitors to the Intervener's Solicitors under cover of the letter of 8 March 1991. But it would appear that Dato Tan did not receive these until after the payment of the full balance of the purchase price.

In support of its view that Dato Tan had not received the relevant resolutions until after the payment of the balance of the purchase price, the Court of Appeal had, over the objections of Counsel for the Father, relied upon the contents of an affidavit affirmed by Dato Tan and filed in support of his application to set aside an injunction restraining dealings in the disputed properties. The reasons for the Court of Appeal so holding appear from the following passage in its judgement:

> Now, Encik Das, in his final reply strongly objected to any reliance being placed on this paragraph of the affidavit on the ground that Dato Tan had not been cross-examined about it. That submission would be entirely correct if the intention was to contradict Dato Tan under s. 145 of the Evidence Act or to impeach his credit under s. 155(c) of that Act. But as I understood Encik Nathan, he had not sought to establish any contradiction. I think he was perfectly entitled to rely on para. 7 as an admission under ss. 17, 18 and 21 of the Evidence Act: *M.A. Clyde v. Wong Ah Mei* [1970] 2 MLJ 183, 185.
>
> The upshot is that there was no prior forwarding of these resolutions as suggested by Counsel when he opened the second appeal. Did the Intervener then act with prudence by not calling for these resolutions at the very outset? I am inclined to answer that question in a firm negative.

It is clear law that if interlocutory relief has been asked for on affidavits by persons who are not called as witnesses at the trial, the other party is entitled to refer to such affidavits at the trial in order to comment on the statements in them and to point out discrepancies between such statements and the evidence of the witnesses called. (See, *Earle's Utilities v. Jacobs,* 51 TLR 43. cf. *Re Chennell* 8 Ch. D 492; *Brier v. Evison* 26 Ch. D 238; *Campbell v. Rothwell* 38 LT 33; *Re Cohen* [1924] 2 Ch. 515.).

In the present case, however, Dato Tan was called as the principal witness for the Intervener/Purchaser but at no time while he was in the witness box, was a single question put tohim in cross-examination regarding his affidavit, and the question arises whether the Court of Appeal was justified in rejecting evidence of the contemporary correspondence, to wit, the letter dated 8 March

1991, from the Solicitors for the Family Company to the Solicitor for the Intervener/Purchaser, which indicated that the resolutions had been sent long *before* the payment of the balance of the purchase price.

The Court of Appeal took the view that as the intention of Counsel for the Father was not to contradict Dato Tan but, merely to rely on the contents of the affidavit, as evidence of an admission, it was not necessary to have put those contents to Dato Tan in cross-examination.

With profound respect to the Court of Appeal, we cannot agree. What was germane to the issue at hand was whether it was fair for Counsel for the Father and, consequently, for the Court of Appeal to rely on the contents of Dato Tan's affidavit, as substantive evidence, in particular, as an admission, when that affidavit had not been put to Dato Tan in cross-examination, with the result that Dato Tan had been denied the opportunity of explaining it, eg, he might have said that the contents of the affidavit had been made in error, having regard to the contemporary correspondence, to wit the letter dated 8 March 1991. We are supported in this by what Hunt J said in the *Allied Pastoral v. F*C of T, 44 ALR 607 at 631-2:

> An issue between X and Y is whether X was in Melbourne upon a specific date and at a specific time. X bears the onus of proving that he was not in Melbourne. He gives evidence in his case in chief that he spent the whole day in Sydney with A and B. There are then a number of different situations which may arise.

His Lordship then postulated five situations, of which situation (5), would be relevant to the present case, and was as follows:

> (5) Y does give fair warning that the evidence of X is challenged, by putting to him simply that he was in Melbourne at the time and place where C and D saw him; there is in evidence (upon some other issue), whether tendered by X or by Y, a diary kept by X in which there is an entry that X had an appointment to see Z in Melbourne on the relevant date and at about the relevant time; Y does not draw any attention to this entry during the course of the evidence, but asks the tribunal by reason of the existence of this entry in the diary to disbelieve the evidence of X.

Referring to situation (5), His Lordship then said this:

> In accordance with the decision of the Court of Appeal in *Cullen v. Ampol Petroleum Ltd, N.S.W.* Court of Appeal, 20 Oct. 1970 unreported, consistently with all the other authorities to which reference has been made and provided that such a use of the diary had not in any way been foreshadowed, it would in my view be wholly unfair for Y to rely upon the diary in seeking to have

> the tribunal of fact disbelieve the evidence of X that he was not in Melbourne. If the diary had been put to X, or its significance had in some other way been made apparent, X could have explained, for example, that the entry had been made in error, or that the appointment had been cancelled, and he could have called Z to corroborate his explanation for the existence of the entry. In the absence of forewarning, X would have no chance to do any of these things. He would, to use the expression of Holmes JA in Cullen, have been well caught in an ambush.

With respect, therefore, it was a misdirection for the Court of Appeal to have relied on the affidavit of Dato Tan as constituting an admission as aforesaid, and in concluding, as a result, that the Intervener/Purchaser had acted imprudently by not calling for the resolutions at the very outset.

We note, in passing, that the solicitor for the Intervener/Purchaser Mr. Choo, gave evidence but he was not cross-examined on this point.

We must now direct attention to a separate matter. Some four weeks after judgment was reserved in the present case, Counsel for the Father, without the leave of this Court, and without the consent of his opponent, put in a written submission running into some 12 pages, to which Counsel for the Intervener/Purchaser took strong exception. In so doing, Counsel for the Father relied on r. 22 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides:

> Advocate and solicitor to bring to Court's attention any proposition of law etc.
>
> (a) Where after the conclusion of the evidence and argument and while judgment is reserved, an advocate and solicitor discovers a proposition of law or a decision of law which is directly in point, he shall bring it to the Court's attention and the advocate and solicitor appearing on the other side shall concur in the proposal even though the proposition is against him.
>
> (b) Where the other advocate and solicitor does not concur, it is still in order for the first-named advocate and solicitor to submit the additional authority and the proper course is for the first-named advocate and solicitor to send the other advocate and solicitor a copy of his letter to the Court, so that the other advocate and solicitor can comment on it if necessary.

In our view, given the circumstances of the present case, reliance on r. 22 Counsel for the Father was misplaced as it concerns only propositions of law directly in point. But we accept that this could have been due to a genuine misunderstanding on the part of Counsel for the Father. Nevertheless, in a situation such as this, as a matter ot courtesy, one would expect, an attempt to seek the concurrence of Counsel on the other side, before putting in a supplementation by way of written submission.

Two points were taken in the written submission put in by way of supplementation.

The first was a pleading point. It was argued that the Intervener/Purchaser did not apply to become a co-Plaintiff or a co-Defendant or other party to the proceedings, and that the consequence of this was fatal to its case. We have already disposed of this point and concluded that in the particular circumstances of the present case, it is without substance and we need say nothing more about it.

The second point – put shortly – was that having regard to the findings of the High Court and the Court of Appeal, the relevant instruments of transfer were "insufficient or void" within the meaning of s. 340(2)(b) of the Code. This was really a new point and was not even raised before us during the hearing. We subscribe to the practice of the Privy Counsel that as general rule this Court will not consider new points of law raised for the first time. (See, *Keng Soon Finance Bhd. v. M.K. Retnam* [1989] 1 MLJ 457 per Lord Oliver of Aylmerton at p. 461. And see also, *United Marketing Company v. Hasham Kara* [1963] 1 WLR 523.) It is therefore unnecessary for us to consider this second point. But, had it been necessary for us to do so, in our view, with respect, the point was without substance. If, as we find, that the Purchaser is entitled to rely on the rule in *Turquand's* case, it matters not one wit that the instruments of transfer were '"void or insufficient" within the meaning of s. 340(2)(b) of the Code, for the Court would be at liberty to enforce the agreement of sale and purchase by requiring the Family Company to execute a valid and registrable transfer.

So much for the two points taken by way of written supplementation.

Now, in summing up its conclusions on the key issue: was the Intervener/ Purchaser a *bona fide* Purchaser for value?, the Court of Appeal said this:

> ... there is but one conclusion that may be reached from the totality of the circumstances that have presented themselves before me in this appeal. It is this. The Intervener was faced with a set of facts that must have aroused the deepest suspicion in the mind of a reasonable man in his position. He chose to put these facts aside and proceed notwithstanding the loud and clear warning that they sounded. It does not lie in his mouth to say that he relied on the public documents of the company. Neither can he say that he was a Purchaser for value who acted in good faith. The Judge was entirely correct in the decision he reached. Accordingly, the second appeal was dismissed.

In so concluding, the Court of Appeal relied on certain circumstances which it considered must have put Dato Tan, who represented the Intervener/Purchaser, "on inquiry" and yet he failed to inquire with the result that the Intervener/Purchaser was deprived of the protection conferred by the Rule in *Turquand's* case.

What then were these circumstances'? For convenience, they may be taken in substance from the judgment of the Court of Appeal and may be stated thus:

> First of all, the Court of Appeal noted that when file sale and purchase agreement in draft was sent by the Intervener/Purchaser's Solicitors to the Vendor's Solicitors the latter deleted the address of the registered office of the Vendor being Jalan Tan Sri, Sibu, appearing therein and substituted an address care of themselves.

Although the Court of Appeal rightly inferred that this amendment must have been made by the vendor's Solicitors upon the instructions of the Mother and the Eldest Son in other words Dato Tan had no hand in it – yet the Court of Appeal criticised Dato Tan in the following terms:

> Surely, Dato Tan, who by his own evidence is a man with some experience in such matters, ought to have asked himself why a solicitors' address was being used instead of the first defendant's registered office. By itself it may have meant nothing. But then one has the First Caveat which pre-dated the agreement and even the option in which some person other than those he was dealing with claims to be the chairman and managing director of the first Defendant. And in that First Caveat one finds the registered address of the company. Should it not have then occurred to Dato Tan that the omission of the registered address may have been to prevent any notices required to be given under the agreement from reaching file registered address? It can therefore hardly be said that this was a normal agreement or a routine transaction from the very start.

With respect, we do not consider this criticism to be justifiable.

It is true that the First Caveat would, as we have said, have raised a doubt regarding a possible abuse of power "by unauthorised person or persons", and there was thus a duty resting on the Intervener/Purchaser not to ascertain whether the transaction was regular, but *merely* to neutralise the circumstances of suspicion, and this duty we consider was sufficiently discharged, when he enquired of the Mother who was the secretary for the Family Company whether she had the title deeds, and received an affirmative reply – a reply, as it turned out, was true. The case of *A.L. Undemvood Ltd (ibid)* shows that in such a situation, reasonable explanations given by the agent in answer to inquiries would suffice.

The point made by the Court of Appeal about the substitution of the Vendor's Solicitors' address for that of the registered office of the Vendor, in the Sale and Purchase Agreement, was a point upon which neither Dato Tan nor anyone else was cross-examined. If there had been such cross-examination, the witness might have explained that it was for convenience as the Vendor's Solicitors were based in Johor Bharu or there might have been some other explanation.

Secondly the Court of Appeal referred to the First Caveat and was of the view that it raised the vital question: "knowing that someone else is claiming to be the chairman and managing director of the vendor and that the titles had been allegedly removed without authority, is it prudent to continue to deal with those who may be bereft of authority?" This implies that it was the duty of the Intervener/Purchaser not merely to inquire but to ascertain whether the transaction was regular. With respect, this was putting the duty upon the Intervener/Purchaser too high.

We have already stated the nature of the duty cast upon the Intervener/Purchaser by reason of the First Caveat having regard to the surrounding circumstances, and that this duty had been sufficiently discharged. We have also said that the statutory declaration filed in support of the First Caveat made no mention of the family squabble or that the mother's faction was not authorised to sell. Moreover, Dato Tan had sought the advice of his Solicitors who said that "there should not be any problem to remove the caveat."

In our view, the mother's explanation that she had the title deeds and the Intervener/Purchaser's solicitors' advice were sufficient to neutralise the circumstances of suspicion aroused by the First Caveat. Indeed, solicitor had testified:

> When the agreement was executed in December 1990, the caveat was not disclosed as 2nd Defendant had informed me and my client that the titles were misplaced and subsequently found.

Two further points are worth noting as regards this part of the case. It will be recalled that some two weeks before signing the Sale and Purchase Agreement, the Intervener/Purchaser's Solicitors had obtained a result of search at the Companies Registry which showed that according to Form 49 dated 19 April 1990, the Mother and the Eldest Son were both directors of the Family Company the former being also the secretary. Thus, the Intervener/Purchaser was entitled to rely on the contents of Form 49 and had every reason to suppose that it was dealing with authorised persons of the Family Company. (See, *K.L. Engineering Sdn. Bhd. & Anor. v. Arab Malaysian Finance (ibid.)*).

In this context it is worth quoting the following passage from Professor Pennington's book on *Company Law* 7thEdn., at p. 143:

> The statement giving particulars of the first directors of a company filed with the papers to lead to its incorporation (Companies Act 1985, s. 10(2)) and the notification of any change in a company's directors or the particulars registered in respect of them which the company is required to give the Registrar of Companies (*Ibid*, s. 288(2)) may be relied on by a third person who deals with the persons currently shown as the company's directors in the belief that they were properly appointed and still hold office, but it is necessary for this purpose that the third person should have inspected the notification in the case of directors other than those appointed on the company's incorporation, or at least, that he should have relied on that notification (eg, because he was informed that notification had been given). The company is bound by the notification under the common law rules of estoppel, which apply when a statement of fact is made on which other persons are intended to rely, and so this is not strictly speaking an application of the rule in *Royal British Bank v. Turquand*, but an alternative means of achieving the same result.

The next point is this: it will be recalled that the Intervener/Purchaser had relied upon a document obtained prior to the execution of the Sale and Purchase Agreement, which taken at its full face value, was a director's resolution of the Family Company dated 26 May 1990 authorising the Sale of the disputed properties to it. Thus, even if the Mother and the Eldest Son were not actually authorised persons, the resolution will nevertheless amount to a representation by the Family Company upon which an estoppel may be based and we would so hold.

Thirdly, with regard to the purchase price of RM4.8 mil referred to in the Sale and Purchase Agreement and the memorandum of transfer of the disputed properties, this was challenged by the Counsel for the Father both in the High Court and in the Court of Appeal who suggested that the true purchase price was RM6 mil. Both the High Court and the Court of Appeal were of the view that in the face of this challenge it was the duty of the Mother and her faction to have called the brokers who had negotiated the sale and to prove that the purchase price was RM4.8 mil, and that the omission to call them, justified invoking the presumption that if called they would have said that the true purchase price was RM6 mil. The Court of Appeal noted that Dato Tan had himself said that the asking price was RM6 mil, that he had counter offered RM4 mil, ending in agreement at a price of RM4.8 mil.

With respect, it is difficult to see how there could be justification for invoking the presumption under illustration (g) of s. 114 of the Evidence Act against the Intervener/Purchaser for having failed to call the brokers. Illustration (g)

says this: "The Court may presume – that evidence which could be and is not produced would if produced be unfavourable to the party who withholds it". There was no evidence that the Intervener/Purchaser had "withheld" the testimony of the brokers; there had merely been an omission to call them.

On the contrary, Intervener/Purchaser was entitled to rely on the contemporary documents, to wit, the Sale and Purchase Agreement, and the memoranda of transfers of the disputed properties, to invoke the presumption contained in illustration (f) of s. 114 of the Evidence Act for the purpose of establishing the true price paid for the disputed properties. So far as material, illustration (f) provides that: "the court may presume that the common course of business has been followed in particular cases".

Woodroffe and Amir Ali, on the *Law of Evidence* (15th Edn. 1991), in commenting on the scope and applicability of illustration (f) of s. 114 of the Indian Evidence Act, which is in *pari materia* with ours' say this (at p. 849):

> Several presumptions are made from the regular course of business in public offices ...
>
> ... Similar presumptions are drawn from the usual course of men's private offices and business ...

Similarly, the learned authors say this (at p. 863):

> Actually under this section, there is a presumption not only that official acts have regularly been performed, but also that ordinary business acts have normally been carried out ... .

By way of illustration the case of *Suruchi Bala & Ors. v. Suruchi Bala Deb & Ors.* AIR [1976] Gau. 92, may be referred to. In that case the Court said this (at pp. 93, 94):

> A Court always presumes the apparent to be the real unless the contrary is proved. The burden is upon he who alleges that the apparent is not the real to prove that the apparent is not the real. In the instant case Ext. A is a registered deed purporting to be a Hiba-bil-Ewaz for a consideration of Rupees 1,000. The Court, therefore, presumes that the suit land was transferred by a registered Hiba-bil-Ewaz for Rs. 1,000 by Washil Ali on 27-9-45 to Masukuddin, who sold it to Defendant No. 1 on 26-9-52. The Plaintiff has failed to rebut that presumption.

On this basis, the Intervener/Purchaser would be entitled to contend that the affirmative testimony of its Solicitor Mr. Choo, Dato' Tan and the Mother, as to the purchase price of the disputed properties being RM4.8mil, was reinforced by the presumption under illustration (f) of s. 114 of the Evidence

Act arising from the statements as to the purchase price in the Sale and Purchase Agreement and the relevant memoranda of transfers, the price quoted in these contemporary documents being *prima facie* evidence of the true price. Thus the burden of proving that the true price was RM6 mil **not** RM4.8 mil would then be on the Father and his faction and this burden they might have succeeded in discharging by calling the Solicitor for the Vendor and, perhaps, the brokers. But neither the Father nor his faction adduced such evidence.

The Court of Appeal was also of the view that the fact that Clause 10 of the Sale and Purchase Agreement required the vendor's Solicitors to withhold RM300,000 for real property gains tax reasonably supported the Father's case that the "real sale price" was RM6 mil and not RM4.8 mil as stated in the contemporary documents, to wit, the Sale and Purchase Agreement and the transfers. The reason for this according to the Court of Appeal was because "It is a matter of idle curiosity to arrive at the simple deduction that 5% of RM6 mil is RM300,000".

Before the Court of Appeal, Dr. Das had submitted that there ought to have been hard evidence before an inference could be reasonably drawn that the price was RM6 mil. The Court of Appeal disagreed saying that Clause 10 provided hard evidence.

As for the inference drawn by the Court of Appeal from Clause 10 of the sale and Purchase Agreement, we consider this was mere surmise or conjecture and got nowhere near to rebutting the presumption under s. 114(f) of the Evidence Act.

On the other hand, there was the affirmative testimony of the Solicitors for the Intervener/Purchaser, Mr. Choo, who denied that the purchase price was RM6.68 mil. There was also, as we have said, the testimony of Dato' Tan and the Mother that the purchase price was RM4.8 mil.

With respect, therefore, it is difficult to agree with the conclusion by the Court of Appeal that the price quoted in the Sale and Purchase Agreement was understated especially so, in view of its finding that there was no basis for a case of conspiracy against the Intervener/Purchaser.

Fourthly the Court of Appeal criticised Dato' Tan for the Intervener/Purchaser for having paid RM100,000 – a large sum – in cash in Singapore on 26 October 1990 for the purchase of the option – and obtaining only a personal receipt from the Mother. However, a perusal of the receipt shows that it was signed by the Mother for and on behalf of the Family Company and soon after Dato' Tan had obtained the option he had appointed Solicitors to act on his behalf. Dato' Tan also said that he had paid in cash because he was used

to dealing in cash though he acknowledged that it would have been more prudent to use an account payee cheque when dealing with a limited company. We consider that the criticism by the Court of Appeal regarding this part of the case was unduly severe. Payment by cash did show lack of prudence on the part of Dato' Tan but cannot be taken further when it is remembered that the Court of Appeal had absolved Dato' Tan of the charge of conspiracy.

Fifthly, the Court of Appeal criticised Dato' Tan for not having taken the precaution of calling for a resolution confirming that the Mother had authority to act on behalf of the Family and effect a sale at a price of RM4.8 mil before he paid the sum of RM100,000.

In our view, having regard to the circumstances of this case, it would have been prudent, but not necessary in law, for Dato' Tan to have called for such a resolution, at such an early stage of the proposed transaction.

Sixthly the Court of Appeal questioned the haste with which Dato' Tan was given vacant possession of the disputed properties; that is to say, after obtaining the option but before execution of the sale and Purchase Agreement and found it "quite unacceptable to say that this was a normal transaction." Neither the Mother nor Dato' Tan was cross-examined on this point and so it is not possible to know what explanation (if any) they would have offered had they been so cross-examined.

Whilst we agree that it would be unusual for a Purchaser to be given vacant possession at such an early stage, the finding of the Court of Appeal that there was no basis for a case of conspiracy against the Intervener/Purchaser, neutralises the fact that vacant possession was given at such an early stage. Moreover, Dato' Tan had paid a sum which was appreciably more than the conventional deposit in a sale and purchase transaction of land, and his company also owned lands adjoining the dispute properties. In any event, we do not consider that the fact the Mother and her faction were prepared to give vacant possession to Dato' Tan at such an early stage was sufficient to put Dato' Tan "on inquiry" as to their authority to effect the proposed transaction.

Seventhly, the Court of Appeal held, agreeing with the Trial Judge, that the execution of the transfers of the disputed properties on behalf of Intervener/ Purchaser, at a time before its incorporation indicated "undue haste" on the part of Dato' Tan. The Court of Appeal raised the question: why could not the Purchaser wait a few more days for incorporation?" and added: "In fact, the intervener (the Purchaser) was in such a hurry to do the deal that even the ratifying resolution was so defective because it made no provision for the ratification of the transfers."

The finding of the Court of Appeal that there was no basis for a case of conspiracy against the Intervener/Purchaser neutralises these criticisms. It would, of course, have been technically more correct for the Intervener/Purchaser to have exercised some patience in regard to the execution of the transfers, instead of having to rely on a retrospective resolution regularising the premature execution of the transfer.

Furthermore, pre-incorporation transactions are an inevitable feature of many new corporations and we do not consider that anything sinister should be read into such transactions and, especially so in the present case, since the Court of Appeal had found that there was no basis for a case of conspiracy against the Intervener/Purchaser.

Eighthly, the Court of Appeal criticised Dato' Tan on the basis that the Sale and Purchase Agreement provided for the payment of a deposit which was abnormally large. It pointed out that the usual deposit in such transactions was 10% and that this had been judicially recognised. (See, eg, *Linggi Plantations v. Jegathesan* [1972] 1 MLJ 89). In the present case, however, the deposit was RM668,000, which to quote the Court of Appeal was neither 10% nor 20%. But Dato' Tan had explained the payment of this odd sum by way of deposit. He said the figure was chosen "because it means prosperous all the way". The explanation did not "impress" the Court of Appeal "as being genuine". With respect, we consider that it is an explanation which is difficult to rebut.

Ninthly, the Court of Appeal criticised Dato' Tan for paying the balance of the purchase price in Singapore in cash on 15 March 1991 after the Second Caveat had been lodged.

Dr. Das had submitted in the Court of Appeal that this payment had been made by Dato' Tan on the advice of his Solicitors but the Court of Appeal rejected this submission in the following terms:

> The only 'advice' which Encik Choo, the solicitor seems to have given is that there was no problem about removing the caveat. But the idea of making payment in cash in Singapore appears to have come from the second Defendant and the Intervener was prepared to go along with this off' his own bat with no reference to any advice from any quarter.

Before us, Dr. Das submitted that the Court of Appeal had misread the evidence, regarding this part of the case, and drew our attention to the following passages in the testimony of the Intervener/Purchaser's solicitor Mr. Choo.

I have the letter from M/S Yeo, Tan, Hoon & Tee returning the cheque to me.

Letter dated 8 March 1991 identified and produced - P9 (no objection).

In respect of the last paragraph, I left it to my client to re-negotiate. Upon the successful negotiation I released the money to my client and my client informed me that they would pay directly to 1st Defendant company and I requested my client that whatever payment they made they must obtain the official receipt. The official receipt dated 15 March 1991 was given to me.

This receipt was signed by the Mother on behalf of the Family Company.

We consider that the submission by Dr. Das, regarding this part of the case, was well grounded. Explaining why he paid the balance of the purchase price inspite of the Second Caveat which had been lodged on 29 December 1990, Dato' Tan said this:

In February 1991 I paid the balance of the purchase price as I was advised by my Solicitors to do so otherwise the deposit would be forfeited under Sale and Purchase Agreement.

Page 61 of PE 1 refers.

I was angry when the balance of the purchase price was returned to my Solicitors. I paid the balance of the purchase money in Singapore currency. I paid the money in spite of the fact that 2nd Defendant could not give me the property free of encumbrances. I did so only after the meeting with the 2nd and 3rd defendants and they were so sincere that they wanted to sell the lands to me and I need to save my face as the people in Pekan Nanas knew of my purchase of the lands. Further I spent half a million to improve the lands coupled with the fact that my lands were near to those lands. So I decided to purchase the lands when Mr. Choo promised me there would not be any problem to remove them.

Incidentally both the caveats were subsequently removed in August 1991 but the disputed properties had also been injuncted and these remain in place up to the present time despite an attempt to remove them.

Explaining the form which the payment took and the place of payment, Dato' Tan said that he had done so at the behest of the Eldest Son who had asked for this on grounds of convenience.

With respect, we consider that had the Court of Appeal not misread the testimony of the Solicitor Mr. Choo – which actually corroborated that of Dato' Tan – it is more likely than not, that it would have looked at the explanations of Dato' Tan more sympathetically. We consider these explanations in no way improbable.

Tenthly, the Court of Appeal found that when Dato' Tan completed the transaction by paying the balance of the purchase price in cash in Singapore to the Mother, he had overlooked Clause 10 of the sale and Purchase Agreement which required the vendor's solicitors to retain a sum of RM300,000 out of the balance for the payment of real property gains tax nor did he comply with s. 21B(1)(a) of the Real Property Gains Tax Act 1976, which requires an acquirer of land to retain not more than 5% of the sale price pending assessment by the revenue.

The Court of Appeal considered that this indicated the Purchaser's "haste to acquire the lands". But Dato' Tan had made this payment after consulting with his Solicitors. Undue haste was an equivocal fact, and might very well have indicated lack of prudence on the part of Dato' Tan, and indeed, as the Court of Appeal rightly noted, "the entire cross-examination of this witness proceeded on the basis that he had acted imprudently." But, although lack of prudence in this regard and the fact that Dato' Tan had breached the taxing statute, might have exposed him to liability thereunder, these were not matters relevant for the purpose of determining whether as an outsider he was entitled to invoke the Rule in *Turquand's* case or the question whether his company was a *bona fide* Purchaser.

Eleventhly, the Court of Appeal drew attention to the fact that *ad valorem* on the transfers was assessed at RM5,002,986.25 by the Collector of Stamp Duties for the purpose of levying duty, and so the transaction required approval of the Foreign Investment Committee (FIC) under the relevant guidelines, but no such approval had been sought by the Intervener/Purchaser. Dato' Tan's explanation for this was that he did not consider this important. It was open to argument whether FIC approval was necessary as the price of each plot was less than RM5 mil. Quite apart from this, the transactions having been injuncted, the parties had never reached the stage of FIC approval. With respect, it is difficult to see the relevance of this point, to the key question which arose for decision.

The remaining points which were argued in this appeal were twofold:

(1) Whether, Counsel for the Intervener/Purchaser was correct in his contention based on *Waimiha Sawmilling Co. v. Waione Timber Co.,* the effect of which was: that mere knowledge of an unregistered claim or interest does not amount to fraud within the meaning of s. 340(2)(a) of the Code and so sufficient to defeat the title of the registered proprietor?

(2) Whether, the Court of Appeal was right in holding that even in a dispute involving the immediate parties to a sale and purchase transaction, a person is necessarily disqualified from being a *bona fide* Purchaser for value if he has not paid the full purchase price under the contract of sale, regard being had to s. 26(b) of the Specific Relief Act?

We now take each of the above topics in turn.

As to point (1), which is based on the *Waimiha Sawmilling* case, when considering the relevance of the Second Caveat to the question whether the Intervener/Purchaser was a *bona fide* Purchaser for value, the Court of Appeal said this:

> With regard to the Second Caveat, the submission is that it came too late, that is to say, after the sale and purchase agreement had been entered into. It was submitted that the Intervener having paid the 10% deposit was already a *bona fide* Purchaser and that therefore the Second Caveat was *nihil ad rem* ...
>
> In the light of our own common law there is no basis to suggest that the Second Caveat came too late. As a matter of pure law, when the Second Caveat was entered, the Intervener was not a *bona fide* Purchaser of the lands in question. The question then arises whether he could become a *bona fide* Purchaser by its mere removal after he had acquired knowledge of its contents. For my part, I would, with confidence, answer that question in the negative. In my judgment, as a matter of law, once a man's mind has become infected with knowledge of an adverse claim or a doubt or cloud upon the vendor's right to convey title *before* he has paid his money in full, he remains what he was at the earlier stage: a person who is not a bona tide Purchaser.

The question for decision regarding this part of the case is: if the Intervener/Purchaser had entered into a sale and purchase agreement which was binding on the Family Company – and we would so hold – but *subsequently before* payment of the balance of the purchase price, it had become aware of the Second Caveat and the statutory declaration in support thereof, and notwithstanding this, acting upon the advice of its Solicitors, it had paid the balance of the purchase price, would it be right in Law to hold that it was disqualified from being a *bona fide* Purchaser for value?

In our view, in order to answer this question it is only necessary to consider what would have happened had the transfers of the disputed properties in favour of the Intervener/Purchaser been duly registered and an attempt were made by the Family Company to challenge the registered title of the Intervener/Purchaser. In such a situation, the Father and his faction could only succeed by establishing any one of the exceptions to indefeasibility provided under s. 340(2) of the Code, the only relevant one being, s. 340 (2)(a) of the

Code, which provides that in any case of fraud to which the person or body, was a party or privy, the title or interest of such a person or body shall not be indefeasible.

We now turn to consider some of the cases where the meaning of "fraud" under s. 340(2)(a) was discussed, with the admonition that whether fraud is proved will depend on the particular circumstances of each case.

The Privy Council case of *Assets Co. v. Mere Roihi* [1905] 1 AC 176 (per Lord Lindley), is generally accepted in all Torrens jurisdictions as correctly laying down the definition of fraud; namely, that the word means "actual fraud or dishonesty of some sort, not what is called constructive or equitable fraud".

And, the following passage in the judgment of Lord Lindley in *Assets Co. Ltd. v. Mere Roihi (ibid),* at p. 210, requires courts to make an assessment of the conduct of the registered Purchaser in each case to see whether it amounts to fraud in the sense of dishonesty:

> Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered Purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

In *Waimiha Sawmilling Co. v. Waione Timber Co. (ibid)* shorn of side issues, the facts were these: H was the registered proprietor of land under the New Zealand Torrens system. He entered into a timber agreement with the appellant company, which the company protected by a caveat. Alleging breaches of covenant, H later purported to determine the interest of the company by a re-entry on the land. The company contested the validity of the re-entry, and commenced litigation, which became protracted by appeals. While this litigation was pending:

(a) the land was sold by H to an agent for the Respondent company;

(b) H obtained an order from a Judge directing removal of the caveat; from this order no appeal was made; and

(c) A transfer to the Respondent company was registered.

The litigation ultimately resulted in favour of the appellant company with damages against H. Damages proving unavailing, the company sought to have the transfer set aside on the ground that the taking of title in the face of pending litigation, and with knowledge of it, amounted to actual fraud on the part of the Respondent. Both the Supreme Court of New Zealand and the Privy Council rejected this plea.

The *Waimiha Sawmilling* case is a good illustration of the proposition that the effect of notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's title.

In the course of his judgment, Lord Buckmaster speaking for the Board, after referring with approval to the definition of fraud laid down by Lord Lindley in Assets Company, said this (at p. 107):

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

Then, applying the definition of fraud, as aforesaid, to the circumstances of the case before him, his Lordship said this:

> In the present case fraud is sought to be established by the following facts: That Wilson knew of the appellants' claim and that they were pursuing litigation to have that claim upheld, and also that the Solicitors of Howe immediately after the removal of the caveat stated that they desired the utmost expedition to get the transaction registered in favour of Wilson, because they regarded it as possible that an application might be made for an injunction, the documents being in fact prepared with such haste that the boundaries had to be rectified subsequently to the transfer. All this is true, but it is also true that Howe knew that the judgments of the courts were in his favour, and that any hindrance or delay in the carrying out of the transaction would cause him grave embarrassment, so that having got a judgment in his favour, he wished to be secure and protected against the delay that might ensue if further steps were taken in the litigation; at the same time he was also aware of this – that

> an original notice of appeal in the action had not been proceeded with, and the learned Judge before whom the case had come not being satisfied as to the *bona fides* of the appellants and realizing the importance of Howe being prevented from dealing with his lands expressly removed the caveat in order that those dealings should not be delayed. Had that judgment been appealed against and the order of Sim J reversed, different considerations might have arisen, but it was left unchallenged, and all that Howe did was to act upon the hypothesis that it was sound and to attempt to strengthen the position as far as possible by speedy completion of the transaction. Even now no attempt has been made to question the judgment of Sim J, and that circumstance, in their Lordships' opinion, alone is sufficient; for the learned Judge, with full knowledge of the facts, held that the hindrance to dealing with the property caused by the entry of the caveat should be removed, and even if he were wrong in the view that he took it seems to their Lordships impossible to say that people who acted upon the faith of that judgment were guilty of fraud.

And, also relevant to the present case, is what his Lordship said in the penultimate para of his judgment:

> The second question can be dealt with briefly. In their Lordships' opinion the judgment of Hosking J is complete and unassailable upon this point. Litigation is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor knowledge that steps are being taken to assert that interest can have no more serious effect.

In *Goh Hooi Yin v. Lim Teong Thee & Ors*. [1990] 3 MLJ 23, the High Court Penang Edgar Joseph Jr, J (as he then was) emphasised:

> It is not enough to show that the transfer had the effect of depriving the Plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the intention of cheating the Plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

However, negligence *per se* does not amount to fraud. (See, *Lai Soon Cheong v. Kien Loong Housing Development Sdn. Bhd*. [1993] 2 CLR 199.) The case of *Bunt v. Hallinan* [1985] 1 NZLR 450 (CA) shows that a solicitor's advice given to a Purchaser that the Purchaser could proceed with a transaction and that without such advice the Purchaser would not have thus proceeded, could be most material in determining whether an allegation of fraud has been substantiated.

The Court in Bunt noted that although there was much in the evidence "that would justifiably characterise the actions of the Respondent (Purchaser) as contumacious and highhanded and that "in entering the premises, as he did, on a Sunday morning before the expiry of the notice to the appellants, he acted in an entirely unreasonable fashion", nevertheless, "those actions would not make him guilty of fraud if at the time he took title to the property and later when he exercised what he thought to be his rights as he did he acted honestly".

The Court in Bunt then (at p. 462 para 1) directed attention to a point of "critical importance" in the evidence, namely:

> ... that he (the Purchaser) had asked Mr. O'Donnell, the estate agent' about the appellants' rights of occupation, that the agent had been unable on enquiry at Mr. Bunt's Solicitors to find any trace of the leasing agreement; that the Respondent made it clear to his solicitor, Mr. Keenan, that he would not complete the transaction unless he could take the land exclusive of any interest to the Bunts; that he instructed his solicitor to check on the position; and that Mr. Keenan, having done so, advised him that if a Purchaser obtained title notice of any unregistered interest was not fraud. On receiving that advice the Respondent was prepared to proceed with the transaction. It is to be inferred that had he received advice to the contrary from Mr. Keenan he would not have completed the transaction....

The Court in Bunt, however, entered the following qualification:

> We are not to be understood as saying that a person who receives legal advice to his liking, albeit incorrect, as to his rights to property, is entitled to ignore his own knowledge of material facts which would make that advice suspect. To do so would be to disregard altogether a person's willful blindness which might amount to fraud for the purposes of s. 62 of the Land Transfer Act. However, in the present case there is no suggestion in the evidence that the Respondent acted in this way, and it cannot be said that he did not accept, believe and act on the advice which he received from his solicitor. It was not put to him in cross-examination that he did not really believe his solicitor's advice. Against that background and in the absence of any discussion of this aspect of the evidence in the judgments in the District Court, we cannot infer that the Judge must nevertheless have thought that the Respondent did not really believe and act on the advice he received from his solicitor. Accordingly, we think Roper J was right in holding that the allegation of fraud had not been substantiated.

Applying the principles to be distilled from these authorities to the facts of the present case, in our view, since Dato' Tan, for the Intervener/Purchaser, had completed the transaction by payment of the balance of the purchase price only after obtaining legal advice that he could do so and to ensure that

whatever payment was made to get an official receipt, it could not be said that he had acted dishonestly. If this be the legal position had the transfers of the disputed properties been registered, then there is no reason in principle why if those transfers could not be registered because the disputed properties had been wrongly injuncted, the legal position should be any different.

In the *Waimiha Sawmilling* case (*ibid* at p. 106) the Judicial Committee of the Privy Council adopted the words of the New Zealand Court of Appeal in *Fels v. Knowles* [1906] 26 NZLR 604 at 620 where it said: "Everything which can be registered gives, in absence of fraud, an indefeasible title to the estate or interest or in the cases which registration of a right is authorised, as in the cases of easements or incorporeal rights, to the right registered".

We would, therefore, answer the question posed under question (1) *supra*, by saying that mere knowledge of the existence of an unregistered claim or interest in land may not amount to fraud unless it is demonstrated that there has been a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest therein. (See, *Loke Yew v. Port Swettenham Rubber Co. Ltd.* [1913] AC 491 (Privy Council).

We now move on to consider point (2), which raises the question, whether even in a dispute involving the immediate parties to a sale and purchase transaction, a person is necessarily disqualified from being a *bona fide* Purchaser for value if he has not paid the full purchase price under the contract of sale? The onus was, of course, upon the Intervener/Purchaser to prove that it was a *bona fide* Purchaser for value for this would be a matter peculiarly within its own knowledge. (See, eg, *Ong Chat Pang & Anor. v. Valiappa Chettiar* [1971] 1 MLJ 224, applying *Bhup Narain Singh v. Goldiul Chand Maliton & Ors.* LR 61 IA 115, per Lord Thankerton at p. 122).

In considering the question whether the Intervener/Purchaser was entitled to rely on the doctrine of the *bona fide* Purchaser for value, the Court of Appeal had during the argument drawn the attention of Dr. Das to the provisions of s. 26 of the Specific Relief Act 1950, which are as follows:

> Except as otherwise provided by this chapter, specific performance of a contract may be enforced against:
>
> (a) either party thereto;
>
> (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The Court of Appeal also drew the attention of Dr. Das to the judgment of Lord Thankerton in *Bhup Narain Singh v. Gokhul Chand Mahton* LR 61 IA which is authority for the proposition that the burden of proving that one is a *bona fide* Purchaser for value lies upon him who so asserts.

Dr. Das had in response conceded that there was an evidentiary burden resting upon his client insofar as this question was concerned but argued that the section (s. 26 of the Specific Relief Act 1950) was inapplicable to the present case as it was not a specific performance case but a case which concerned the *Turquand* Rule.

The Court of Appeal nevertheless applied s. 26(b) of the Specific Relief Act 1950, by analogy, to the present case and, in consequence, followed the Indian cases *Sinna Ponnu v. Singaru Odayar* [1969] 2 Madras LJ 358; *Vomisetti Paparao v. Jonnada Venkataramana* [1970] 2 An. WR 280 based on s. 27 of the Indian Specific Relief Act (equivalent to our s. 26(b)) wherein it was held that a man is not to be regarded as a Purchaser unless he has paid the full purchase price.

Although the Court of Appeal was careful to preface its observations regarding this part of the case by saying that the Indian case cited in no way influenced its decision, we find it necessary to point out, with respect, that we are unable to approve these observations. As Mason CJ said in *Northside Development Pty Ltd v. Registrar-General (ibid)* at pp. 167:

The first respondent conceded that s. 25 1A(a) does not apply directly to the present case because the instrument of mortgage was not a deed prior to its registration under the Real Property Act. However, he submits that the sub-section throws light on the Rule in *Turquand's* case. *The short answer is that the statutory' provision cannot be used to interprete the principle of general law"* (Italics supplied).

With respect, if, in case such as the present, recourse were had to cases under the Indian equivalent of our s. 26(b) of the Specific Relief Act (1950) in considering the question who is a *bona fide* Purchaser for value, the *Turquand* Rule could be deprived of much of its vitality in situations such as the present.

When, as here, the question arises whether a person dealing with a company has contracted in good faith there is no qualification on the definition of Purchaser; all that is necessary is that he should have contracted in good faith and have given value. In our view, for this purpose, the Common Law definition of who is a *bona fide* Purchaser is applicable and, for this, we would refer to *Hunt v. Fripp* [1898] 1 Ch. D. 675 cited to us during the argument, where Byrne J said this (at p. 682):

> I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly, that saying "dealing *bona fide*" is equivalent to saying "dealing honestly", and that what I really have to consider is, Were the plaintiffs behaving honestly when they took the assignment in question from Emery?

The above observation of Byrne J was approved by Bingham J in *In re Bennett* [1907] 1 KB 149.

In our view, therefore, when, as here, there is a dispute between the immediate parties to a sale and purchase transaction, a *bona fide* Purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case.

We would, therefore, answer the question posed under point (2) in the negative; that is to say, we are unable to agree with the Court of Appeal regarding this part of the case.

Conclusion

We regret to say, that after anxious deliberation, for the various reasons stated above, we find ourselves compelled to take a different view from that of the Court of Appeal, speaking through Sri Ram JCA, a Judge for whose erudition we have great respect. We would therefore hold that the Intervener/Purchaser had succeeded in establishing that it was, at all material times, a *bona fide* Purchaser for value and so is entitled to have the transfers of the disputed properties registered in its name.

The Result

In the result, we would allow the appeal, set aside the judgments of the Courts below and enter judgments for the Intervener/Purchaser. We are prepared to hear arguments as to consequential orders and any arguments concerning costs on a date to be fixed.